Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

October Term, 1986

IN RE THE MARRIAGE OF
HERBERT J. DREWS, JR.,
by his Guardian, Lorraine Drews

Appellant,

v.

SUE ANNE CARROTHERS DREWS,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. May a State deprive a person who is permanently mentally disabled and incompetent from petitioning, by his guardian, for a dissolution of marriage, although that State allows the spouse of a disabled, incompetent person to so petition?

2. Do the Illinois Probate Act and the Illinois Marriage and Dissolution of Marriage Act, as construed and applied by the Supreme Court of Illinois in this cause, deprive the Petitioner of his constitutional rights to:

   (a) equal protection of the laws?

   (b) due process, including the right of privacy in its substantive due process sense?

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APPEAL FROM THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

The appellant, HERBERT J. DREWS. JR., by his Guardian, LORRAINE DREWS, appeals from the judgment of the Supreme Court of Illinois entered in this case on December 19, 1986, rehearing denied, January 30, 1987. The appellant respectfully submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction over the appeal and that a substantial question is presented.

OPINIONS BELOW

The Opinion of the Supreme Court of Illinois which is the subject of this petition is reported at 115 Ill.2d 201, 503 N.E.2d 339 (1986). (App. 2a) The opinion of the Appellate Court of Illinois (1985) which was the subject of review is reported at 139 Ill.App.3d 163, 94 Ill.Dec. 128, 487 N.E.2d 1005, affirmed. The opinions of both courts are divided; they are reprinted in the appendix to this petition. (App. 10a)

JURISDICTION

The judgment of the Illinois Supreme Court was entered on December 19, 1986. Rehearing was denied on January 30, 1987. This Court's jurisdiction is invoked under 28 U.S.C.§1257(2). Notice of Appeal was filed in the Illinois Supreme Court on April 24, 1978. (App. ___)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amend. XIV

Probate Act of Illinois, Ill.Rev. Stat., 1983, ch. 110-1/2, sec. 11-13(b)

Probate Act of Illinois, Ill.Rev. Stat., 1983, ch. 110-1/2, sec. 11a-18

Illinois Marriage and Dissolution of Marriage Act, Ill. Rev.Stat., 1979, ch. 40, sec. 306

Illinois Marriage and Dissolution of Marriage Act, Ill. Rev.Stat., 1979, ch. 40, sec. 401

STATEMENT OF THE CASE

HERBERT J. DREWS, JR., Appellant-husband, and SUE ANNE CARROTHERS DREWS, Appellee-wife, were married in June, 1979 and thereafter resided together as husband and wife. In October, 1980, the husband sustained a severe and disabling head injury as a consequence of an automobile accident. Appellee continued in her role as wife until May, 1981, at which time she ceased residing in the marital home and abandoned her husband to his parents' care. As a result and because of her son's permanent and total disability, the husband's mother sought and was granted plenary guardianship over his estate and person. As plenary guardian, she had custody of the ward. She also had authority to manage his estate as well as "to do all acts required by law." Under the authority of her appointment as plenary guardian and The Illinois Probate Act of 1975, Ill.Rev.Stat., ch.110-1/2, §11a-18(c)(1983), which states in pertinent part, "The guardian of the estate of a ward shall appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose as guardian or next friend", the guardian on behalf of her ward, filed for dissolution of his marriage.

Appellant alleged that Appellee was "guilty of desertion and extreme and repeated mental cruelty" and further alleged that Appellee was in possession of substantially all of the tangible marital property. There are two choses in action arising out of the accident which are marital assets: the personal injury claim of the husband and the loss of consortium claim of the wife. The guardian, on behalf of her ward, sought judgment of dissolution, equitable distribution of the marital property, and an award of maintenance from the wife.

Appellee filed a Motion to Dismiss the petition with prejudice, specifically claiming that a guardian is without standing to maintain an action for dissolution of her ward's marriage. Appellant, by his Guardian, answered and filed a Memorandum of Law, (App. 41a), in support of the right

of a guardian to petition for dissolution on behalf of her ward, raising (at pages 15-16) *inter alia*, the issues of denial of due process and equal protection under the 14th Amendment to the United States Constitution:

> "To hold in this day and age that an incompetent may neither maintain a dissolution action himself nor have a dissolution of marriage action brought in his behalf by his court-appointed personal representative because of the state's interest in the stability of marriage, but to allow the state to permit a guardian to agree to permit a person to die, is not only *ironic* (as exalting a meaningless marriage, in the context of this case, over life), it is also unconstitutional as a denial of due process and equal protection under the 14th Amendment to the United States Constitution.
>
> "When the early decisions were made by Illinois courts regarding the "personal" right of divorce, the concepts of due process and equal protection had not been fleshed out as they are now. In those days, an incompetent person had very limited rights and no real rights to equality with competent persons not to be discriminated against nor denied access to legal process.
>
> * * *
>
> "The current Illinois guardianship statutes reflect a public policy interest in providing due process to the incompetent. Petitioner contends that due process means in this context that the incompetent cannot be barred from instituting a dissolution of marriage proceeding. To do so would deprive him of equal protection in that all other citizens of Illinois would be able to seek a dissolution, but not incompetent citizens."

No bill of particulars was sought or filed, so that specific allegations as to the grounds were never considered by the trial court. The trial court granted Appellee's Motion to Dismiss without statement as to the Constitutional issues.

Appellant again raised the federal questions sought to be reviewed in his appeal to the Appellate Court of Illinois.

(lst Jud. Circ.) (No. 84-3019) in his *Brief and Argument of Appellant*, at 25-29.(App. 69a). In *In re Marriage of Drews by Drews* (1985), 139 Ill.App.3d 763, 94 Ill.Dec. 128, 487 N.E.2d 1005, a divided Appellate Court affirmed, but did not address the constitutional issues, stating:

> "... Our analysis of [The Probate Act of 1975, Ill. Rev.Stat.1983, ch. 110-1/2, §§11a-17 and 11a-18] leads us to find no explicit basis or duty for a guardian's institution of a marriage dissolution action on behalf of a ward." 487 N.E.2d 1005, 1009.
>
> * * *
>
> "... [N]either the Probate Act nor the IMDMA (Illinois Marriage and Dissolution of Marriage Act, Ill. Rev. Stat. 1983, ch. 40) specifically determines whether a guardian is permitted to or prohibited from instituting an action to dissolve a ward's marriage to another." 487 N.E.2d 1005, 1010.
>
> * * *
>
> "... we conclude that under Illinois law a guardian is *generally* without the authority to commence a marriage dissolution proceeding on behalf of a ward. Parenthetically, we recognize the possibility that there may be compelling instances where it could be clearly shown that dissolution of the ward's marriage 'is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage maximum self-reliance and independence' (Ill.Rev. Stat.1983, ch. 110-1/2, par 11a-13(b)) such that Illinois law might consider granting the guardian the power to institute such a claim." 487 N.E.2d 1005, 1013-14.

In affirming the Appellate Court, the Illinois Supreme Court, again divided, in *Drews v. Drews* (1986), 115 Ill.2d 201, 104 Ill.Dec. 782, 503 N.E.2d 339, 340 took a very different stance, stating:

> "... absent statutory authorization, a guardian cannot maintain an action, on behalf of a ward, for dissolution of the ward's marriage. (citing cases)
>
> * * *

> "The two provisions of the Probate Act of 1975 that govern the duties of either a limited or plenary guardian, when read together, grant only limited standing related solely to matters directly bearing on the management of the ward's estate. We have scrutinized the remaining provisions of the Probate Act of 1975 regulating guardianship for disabled adults and conclude that none of them accord a guardian, limited or plenary, the standing to maintain an action for dissolution of her ward's marriage."

The Court relied, in reaching its conclusion, on a "strong majority rule" consistent with its conclusions (citing 15 jurisdictions) and held that by two early cases, *Iago v. Iago* (1897), 168 Ill. 339, 341, 48 N.E. 30 and *Pyott v. Pyott* (1901) 191 Ill. 280, 288, Illinois had adopted the majority position despite "[t]he mere fact that the rule was not applicable on the facts of these cases". 115 Ill.2d 201, 104 Ill. Dec. 782, 503 N.E. 2d 339, 341.

Thus the constitutional issues were sharpened, for as construed, Illinois statutes in no case permit an incompetent to bring suit, by his guardian, for dissolution of marriage. Accordingly, Petitioner filed a Petition for Rehearing by the Illinois Supreme Court,(App. 55a), raising the federal question at 3-11. The Petition for Rehearing was denied, giving rise to this Appeal.

THE QUESTIONS ARE SUBSTANTIAL

I.

THE PROBLEM PRESENTED BY THIS CASE IMPACTS THOUSANDS OF AMERICANS.

The questions as to the due process and equal protection rights of a permanently incompetent person are substantial and have never before been decided by this Court. Such persons are entitled to due process and equal protection equally with all other citizens.

Appellant is one of 600,000 Americans currently in-

stitutionalized with brain damage. Of these, some 10,000 are in a permanent vegetative state with possibility of return to even a minimal level of social or human functioning being virtually non-existent. There are countless other citizens who suffer severe brain pathology: 2.5 million as a result of advanced Alzheimer's disease, of which 10-20 per cent are completely disabled; 500,000 as a result of Parkinson's Disease, of which 10-25 percent are completely disabled; 200,000 from Muscular Dystrophy, of which 15 per cent are completely disabled. (Statistics provided by the National Organization for each condition.) All of these persons are *de facto* incompetent; many have been judicially so declared.

In a former day, not very long ago, brain injuries and illness which resulted in chronic brain dysfunction were generally fatal. The marital matters of the unfortunate victims by and large resolved themselves in a relatively short period of time, and surviving spouses and family members went on with their lives. Not so today, when medical science and technology have spared these thousands only to leave them with long lives to live and the law with a whole new panoply of issues to be resolved. Herbert Drews (as is the case with many other brain injured and otherwise cerebrally compromised patients) is a relatively young person with a long life expectancy. During all of that time, Herbert will require 24-hour skilled nursing care, medical care and specialized therapy. His economic needs are astronomical. His maintenance and welfare will be benefitted only if his guardian can preserve for him the maximum amount of money for his care. There are many others in a like position.

In the instant case, the Illinois Supreme Court has for the first time construed Illinois statutes such that in no case does a guardian have power to seek a dissolution regardless of the situation of the incompetent. It would not matter, for example, that the spouse is acting contrary to the interests of the incompetent, wasting the incompetent's

assets, even deliberately acting so as to destroy any possibility of humane care (or any care except in the worst public institution for this incompetent of which one might conceive). Indeed, it would not even matter if the spouse had deliberately caused the injury and resulting incompetence through attempted murder or spouse abuse. In none of these cases does Illinois law, as now construed and applied in this case, permit a dissolution of marriage action to be brought on behalf of the incompetent. In all of these cases, the competent spouse has a unilateral right to determine the marital status of the incompetent.

This Court has refused to recognize a spousal veto in the abortion area. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). To permit a spouse to unilaterally veto the right of an incompetent to a divorce is as invidious a denial of individual rights as this Court has prohibited in other specific factual contexts, such as the Iowa presumption that all males make better administrators than females, *Reed v. Reed*, 404 U.S. 71 (1971); or that all pregnant teachers become unable to continue working five months prior to delivery. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

An action for dissolution is the only remedy by which a destructive marriage can be ended. Remedies are the life of rights. If barred from access to this exclusive remedy, the incompetent is left totally at the mercy of a cruel, neglectful and profligate spouse on the theory that "the right to sue for an absolute divorce is a personal right and required the intelligent action of the injured party." *Pyott v. Pyott* (1901), 191 Ill. 280, 288, 61 N.E. 88. An adjudication of incompetence automatically deprives a disabled person lacking capacity of all rights to bring an action for dissolution on his own behalf and thus of all access to the courts for protection or redress from such a spouse. This is a deprivation of due process rights under the United States Constitution.

Petitioner, by his guardian, brought suit for dissolution partly to adjudicate the matter of his estate, but also to bring to an end, once and for all, the "open casket marriage." The simple fact is that there is no marital relationship and no hope of there ever being one: Herbert Drews can remember only faces he sees frequently; his wife is not one of them. His sole hope for decent care lies in an award to him as a result of his personal injury suit. That award, if it ever materializes, will be subject to claims from the Illinois Department of Public Aid for reimbursement of the substantial payments it has already made on his behalf, as well as from his absent wife for a share and for maintenance. Any time his wife wishes, she can bring a petition for dissolution of the marriage and have her marital rights adjudicated. Illinois, by the decision of the Illinois Supreme Court in this case, and twelve other states (Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Missouri, New York, North Carolina, Tennessee, and Texas) yield the disabled spouse whose partner has betrayed and deserted him no legal recourse. *In re Marriage of Drews by Drews*, 139 Ill.App.3d 763, 94 Ill.Dec. 128, 487 N.E.2d 1005, 1012. Such is the case of Herbert J. Drews, Jr., and thousands of others in the United States of America. In this day and age, this cannot be.

II.

A DISABLED PERSON IS DENIED DUE PROCESS OF LAW IF HE IS PRECLUDED FROM PROSECUTING, BY HIS GUARDIAN, AN ACTION FOR DISSOLUTION OF MARRIAGE

The 14th Amendment to the United States Constitution states in pertinent part:

> "... nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"[D]ue process requires at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). The Illinois Supreme Court in the instant case cited no overriding interest of the State of Illinois in refusing Appellant a right to settle his claims of right and duty through the judicial process. Indeed, the court brushed aside the due process as well as equal protection claims of Appellant. The court simply ignored all federal legal claims.

The court never suggested that Illinois statutes give anyone other than the guardian a right to bring such a claim. Why should Appellant here have *no* forum open to contest the continuance of his marriage? Why should his right to exist with some modicum of dignity and comfort be permanently subject to the whim of a spouse who didn't care enough to become his legal guardian and has not even had any contact with him for years? Conversely, why should Appellant's spouse be permitted a unilateral right of action for dissolution of marriage? In the case at bar, the Illinois Supreme Court cites *no* reason supporting any legislative determination to confer such a unilateral right.

It is submitted that no public policy can justify giving only one person (a competent person) the right to sue to terminate a marriage, and deny that same right to an incompetent (as exercised through a duly appointed guardian). For example, this Court has prohibited denial of a special use permit for operation of a group home for the mentally retarded, rejecting as an adequate basis for discrimination negative attitudes of surrounding landowners, undifferentiated fears of harrassment and other attempted justifications. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1986).

This Court has recognized the constitutional right of

equal protection for other incompetent persons unable to assert their full rights under the law. These include access to public schools by children of illegal aliens, *Plyler v. Doe*, 457 U.S. 202, (1982), and access to the courts on behalf of indigents, *Douglas v. California*, 372 U.S. 353, (1963) (right to appointed counsel on appeal), *Griffin v. Illinois*, 351 U.S. 12 (1956) (Right to free transcript needed to perfect criminal appeal).

Illinois clearly permits a guardian to defend on behalf of an incompetent spouse who is a respondent in a dissolution action. *Iago v. Iago* (1897) 168 Ill. 339, 48 N.E. 30, *Merneigh v. Merneigh* (1954), 2 Ill.App.2d 352, 119 N.E.2d 492. Why should incompetents be able to defend dissolution of marriage through their guardians but be unable to bring such actions?

III.

THE APPELLANT'S RIGHT TO PERSONAL PRIVACY HAS BEEN DENIED

This Court has held that the United States Constitution recognizes a right to privacy. This concept includes various rights associated with the family, e.g., a right to procreate, employ birth control, be free of compulsory sterilization, and various rights regarding abortion. Such recognition has included a right to marry without arbitrary barriers. *Zablocki v. Redhail*, 434 U.S. 374 (1978). If the privacy right protects entry into the marital status without arbitrary barriers, why should it not similarly protect a right to access, without arbitrary barriers, to the exclusive state-created mechanism for termination of the marital status? The Illinois Supreme Court has stated no reason for denial of any privacy right; it simply ignored the claim.

IV.

THERE IS NO CLEAR AGREEMENT AMONG THE STATES ON THIS ISSUE

In addition to this instant case in Illinois, sixteen of the fifty states have ruled. Of these, 12 have determined that a guardian lacks the power to institute dissolution of marriage proceedings (although only seven of these by the states' highest courts). *In re the Marriage of Drews by Drews* (1985), 139 Ill.App.3d 763, 94 Ill.Dec. 128, 487 N.E.2d 1005, 1012. Two states have held contra based on statutory interpretation: *Campbell v. Campbell* (1941), 242 Ala. 141, 142-43, 5 So.2d 401; *Cohn v. Carlisle* (1941), 310 Mass. 126, 128-29, 37 N.E.2d 260. The tens of thousands of incompetent persons impacted by the issue presented in this case live throughout the fifty states. It is submitted that the time has come for this Court to speak for the rights of those citizens whose situations require adjudication of their marital rights through their properly constituted guardians.

CONCLUSION

For these reasons this Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

SANDRA G. NYE AND ASSOCIATES
Attorneys for Petitioner-Appellant
HERBERT J. DREWS, JR., by his
Guardian, LORRAINE DREWS

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ILLINOIS SUPREME COURT
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SPRINGFIELD, ILL. 62706
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January 30, 1987

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No. 63005 – Herbert J. Drews, Jr., by his Guardian, Lorraine Drews, appellant, v. Sue Anne Carrothers Drews, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit or other agency on February 9, 1987.

In re MARRIAGE OF Herbert J. DREWS, Jr., and Sue Ann Carrothers Drews, Appellee (Lorraine Drews, Guardian, Appellant).

No. 63005.
115 Ill.2d 201

Supreme Court of Illinois.
Dec. 19, 1986.
Rehearing Denied Dec. 30, 1987.(sic)*

Guardian instituted dissolution on behalf of ward. The Circuit Court, Cook County, Richard H. Jorzak, J., dismissed, and guardian appealed. The Appellate Court, 139 Ill.App.3d 763, 94 Ill.Dec. 128, 487 N.E.2d 1005 affirmed. On grant of appeal, the Supreme Court, Thomas J. Moran, J., held that standing accorded by statute to guardian to represent ward in all legal proceedings did not encompass initiation of action for dissolution of ward's marriage, which was personal, not financial, proceeding.

Judgment affirmed.

Simon, J., filed dissenting opinion.

1. GUARDIAN AND WARD

Absent statutory authorization, guardian cannot institute action, on behalf of adult ward, for dissolution of ward's marriage.

2. MENTAL HEALTH

Standing accorded by statute to guardian to represent ward in all legal proceedings did not encompass initiation of action for dissolution of ward's marriage, which was personal, not financial, proceeding.

S.H.A. ch. 40, ¶302(a)(1); ch. 110 1/2, ¶¶11a-18, 11a-8,(a, c).

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* (Should be January 30, 1987.)

Sandra G. Nye & Associates, Chicago, for petitioner.

Schiller, Du Canto and Fleck, Limited, Chicago, for respondent; David B. Yavitz, Sarane C. Siewerth, of counsel.

Justice THOMAS J. MORAN delivered the opinion of the court:

Petitioner, Lorraine Drews, as plenary guardian of her son, Herbert J. Drews, Jr., filed a petition for dissolution of his marriage in the circuit court of Cook County. Respondent, Sue Ann Carrothers Drews, appeared and filed a motion to dismiss the petition with prejudice for failure to state a cause of action.

The trial court ordered the parties to submit memoranda of law in support of their respective positions. After reviewing the memoranda submitted, the court granted respondent's motion to dismiss the petition with prejudice. A divided appellate court affirmed, concluding that Illinois law does not give a guardian the authority to institute a proceeding for the dissolution of a ward's marriage. (139 Ill.App.3d 763, 776, 94 Ill.Dec. 128, 487 N.E.2d 1005.) We granted petitioner's appeal pursuant to Supreme Court Rule 315 (103 Ill.2d R. 315).

We note that we are reviewing the dismissal of a petition. Therefore, the well-pleaded facts contained in the petition for dissolution will be taken as true. *Knox College v. Celotex Corp.* (1981), 88 Ill.2d 407, 421, 58 Ill.Dec. 725, 430 N.E.2d 976.

Petitioner's son and respondent were married in June 1979 and thereafter resided together as husband and wife. In October 1980, petitioner's son sustained a severe and disabling head injury as a consequence of an automobile accident. Respondent continued in her role as wife until May 1981, at which time she ceased residing in the marital home and abandoned her husband to his parents' care. As a result and because of her son's permanent and total disability, petitioner sought and was granted plenary guar-

dianship over his estate and person. As plenary guardian, petitioner had custody of the ward. She also had authority to manage his estate as well as "to do all acts required by law." Under the authority of her appointment as plenary guardian, petitioner filed for dissolution of his marriage.

Petitioner alleged that respondent was "guilty of desertion and extreme and repeated mental cruelty" and further alleged that respondent was in possession of substantially all of the marital property. Petitioner, on behalf of her ward, sought judgment of dissolution, equitable distribution of the marital property, and an award of maintenance from respondent to the ward.

Respondent moved to dismiss the petition with prejudice, specifically claiming that petitioner was without standing to maintain an action for the dissolution of her ward's marriage. The motion was granted.

A single issue is presented for decision. Does a plenary guardian of a disabled adult have standing to maintain an action for the dissolution of a ward's marriage?

We begin by noting that the issue before us is not novel. It has been addressed over the years by the courts of a number of jurisdictions. Research reveals a strong majority rule that, absent statutory authorization, a guardian cannot maintain an action, on behalf of a ward, for the dissolution of a ward's marriage. *Wood v. Beard* (Fla.Dist.Ct.App.1958), 107 So.2d 198, 200; *Phillips v. Phillips* (1947), 203 Ga. 106, 108-09, 112, 45 S.E.2d 621, 622, 624; *State ex rel. Quear v. Madison Circuit Court* (1951), 229 Ind. 503, 504-05, 99 N.E.2d 254, 255; *Mohler v. Shank's Estate* (1895), 93 Iowa 273, 277-79, 61 N.W. 981, 983; *Birdzell v. Birdzell* (1885), 33 Kan. 433, 435-36, 6 P. 561, 561-62; *Johnson v. Johnson* (1943), 294 Ky. 77, 78, 170 S.W.2d 889, 889-90; *Stevens v. Stevens* (1934), 266 Mich. 446, 254 N.W. 162; *Higginbotham v. Higginbotham* (Mo.Ct.App.1940), 146 S.W.2d 856, 857; *In re Jennings* (1981), 187 N.J.Super. 55, 58-59, 453 A.2d

572, 574; *Mohrmann v. Kob* (1943), 291 N.Y. 181, 189-90, 51 N.E.2d 921, 924-25; *Freeman v. Freeman* (1977), 34 N.C.App. 301, 302-03, 237 S.E.2d 857, 858; *Hart v. Hart* (Tex.Ct.App.1986), 705 S.W.2d 332; *cf. Campbell v. Campbell* (1941), 242 Ala. 141, 142, 5 So.2d 401, 401-02 (stating the general rule but finding statutory authorization); *Cohn v. Carlisle* (1941), 310 Mass. 126, 128, 37 N.E.2d 260, 262 (finding statutory authorization); *Kuta v. Kuta* (1951), 154 Neb. 263, 264-66, 47 N.W.2d 558, 559 (finding statutory authorization).

Illinois early adopted the majority position. (*Pyott v. Pyott* (1901), 191 Ill. 280, 288; *Iago v. Iago* (1897), 168 Ill. 339, 341, 48 N.E. 30.) However, petitioner contends that *Pyott* and *Iago* do not control the present case because the statement of the majority rule contained in those cases is merely *dicta*. We have reviewed both cases and conclude that this contention is without merit.

In both cases, this court recited, with approval, the majority rule that a guardian is without capacity to seek dissolution of a ward's marriage but observed that the rule was inapplicable on the facts before it. In *Pyott*, the rule was inapplicable because the guardian sought annulment, not dissolution, of the ward's marriage. The court cited the well-settled rule that a guardian can bring an action, on behalf of a ward, to declare a marriage void. (Compare with section 302(a)(1) of the Illinois Marriage and Dissolution of Marriage Act, which gives a guardian standing to seek a declaration of invalidity (formerly, annulment) of a ward's marriage (Ill.Rev.Stat.1983, ch. 40, par. 302(a)(1)). In *Iago*, the majority rule was inapplicable because the guardian was defending, not maintaining, an action for dissolution brought against the ward. The mere fact that the rule was not applicable on the facts of these cases does not invalidate its application in the proper case.

[1] We conclude that Illinois follows the majority rule. Thus, absent statutory authorization, a guardian cannot

institute an action, on behalf of a ward, for the dissolution of the ward's marriage.

Petitioner argues that her status as plenary guardian confers upon her the standing to bring the instant proceeding. She contends that section 11a-18(c) of the Probate Act of 1975 (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-18(c)) accords her the requisite standing to seek the dissolution of her ward's marriage.

Section 11a-18(c) provides in pertinent part that "[t]he guardian of the estate of a ward shall appear for and represent the ward in *all* legal proceedings unless another person is appointed for that purpose as guardian or next friend." (Emphasis added.) (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-18(c).) Petitioner contends that this language encompasses the standing necessary to maintain the present action. We do not agree.

[2] An examination of section 11a-18, which contains the provision according legal standing to a guardian, establishes that the standing granted is limited to the discharge of a guardian's duties with respect to a ward's estate. Thus, section 11a-18(a) provides in relevant part:

> "[T]he guardian of the estate shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children, and persons related by blood or marriage who are dependent upon or entitled to support from him, or for any other purpose which the court deems to be for the best interests of the ward, and the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interests." (Ill.Rev. Stat.1983, ch. 110 1/2, par. 11a-18(a).)

In order to discharge these responsibilities, the requisite legal standing is granted to the guardian in subparagraph (c). It is clear, therefore, that the standing accorded a guar-

dian to "represent the ward in all legal proceedings" does not encompass the initiation of an action for dissolution of a ward's marriage, which is a personal, not a financial, proceeding. *Pyott v. Pyott* (1901), 191 Ill. 280, 288, 61 N.E. 88.

The responsibility of a guardian over the personal affairs of a ward is governed by section 11a-17 of the Probate Act of 1975 (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-17). Section 11a-17(a) grants custody of the ward to the guardian and directs the guardian, on behalf of the ward, to make provision for "support, care, comfort, health, education and maintenance and such professional services as are appropriate." (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-17(a).) Further, the guardian is required, insofar as is possible, to "assist the ward in the development of maximum self-reliance and independence." (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-17(a).) We observe that nothing in section 11a-17, which governs the relationship of a guardian to the person of a ward, grants the guardian standing to maintain or defend *any* legal proceeding.

The two provisions of the Probate Act of 1975 that govern the duties of either a limited or plenary guardian, when read together, grant only limited standing related solely to matters directly bearing on the management of the ward's estate. We have scrutinized the remaining provisions of the Probate Act of 1975 regulating guardianship for disabled adults and conclude that none of them accord a guardian, limited or plenary, the standing to maintain an action for the dissolution of a ward's marriage. Thus, applying the general rule to the case at bar, we hold that petitioner lacks the standing necessary to maintain an action for the dissolution of her ward's marriage.

For the reasons stated herein, we affirm the judgment of the appellate court.

Judgment affirmed.

Justice SIMON, dissenting:

The majority holds that a plenary guardian lacks standing to initiate a dissolution of marriage proceeding because the action is too personal to fall within the statute governing guardians for disabled adults. (Ill.Rev.Stat.Stat.1985, ch. 110 1/2, pars. 11a-1 though 11a-23.) It reads the statute as authorizing a guardian to bring suits only in regard to financial matters. In reaching its conclusion, the majority stresses that most foreign jurisdictions preclude guardians from maintaining dissolution-of-marriage actions absent statutory authorization. Because the court views the Illinois statute as silent in this regard, and because on the two occasions in which the court reached this issue it adopted the position of most foreign jurisdictions (*Pyott v. Pyott* (1901), 191 Ill. 280, 61 N.E. 88; *Iago v. Iago* (1897), 168 Ill. 339, 48 N.E. 30), my colleagues have determined that guardians may not institute dissolution actions on behalf of their wards.

The majority's interpretation of the statute is too restrictive. According to the statute, the guardian is to be utilized to "protect [the ward] from neglect, exploitation, or abuse" (Ill.Rev.Stat.1985, ch. 110 1/2, par. 11a-3). In addition, both the statute and our case law have always held that "the primary consideration is the best interest of the incompetent." (*Kinnett v. Hood* (1962), 25 Ill.2d 600, 602, 185 N.E.2d 888; Ill.Rev.Stat.1985, ch. 110 1/2, par. 11a-18.) If the initiation of a legal proceeding though personal can be shown to be beneficial to the maintenance and welfare of the ward, the court ought to allow it. By dismissing this action before determining whether the claim alleged was in the best interest of the ward, the circuit court has avoided its obligation to keep the interest of the ward paramount.

Other jurisdictions have recognized that guardians have the authority to make personal decisions on the ward's behalf. (See *Strunk v. Strunk* (Ky.1969), 445 S.W.2d 145 (authority to seek a renal transplant); *In re Guardianship of Roe* (1981), 383 Mass.415, 421 N.E.2d 40 (authority to sterilize a mentally incompetent woman); *In*

re Conroy (1985), 98 N.J. 321, 486 A.2d 1209 (authority to withdraw life supports).) Recently, in *In re Estate of D.W.* (1985), 134 Ill.App.3d 788, 791, 89 Ill.Dec. 804, 481 N.E.2d 355, our appellate court held that a guardian is vested with broad authority to act in the best interest of a ward and could consent to an abortion for her mentally retarded ward even when the abortion was not necessary to protect the ward's life or health. By allowing guardians to make such decisions regarding dissolution actions, a court preserves "the dignity and worth of such a person [an incompetent] and affords to that person the same panoply of rights and choices it recognizes in competent persons." *Superintendent of Belchertown State School v. Saikewicz* (1977), 373 Mass. 728, 746, 370 N.E.2d 417, 428.

The two Illinois cases on which the majority relies in holding that a guardian lacks standing to initiate a dissolution action (*Pyott v. Pyott* (1901), 191 Ill. 280, 61 N.E. 88; *Iago v. Iago* (1897), 168 Ill. 339, 48 N.E. 30) were written during a time when divorces were relatively infrequent and much more difficult to obtain (see Ill.Rev.Stat.1985, ch. 40, par. 401(a)(2) (irretrievable breakdown of marriage now grounds for divorce)). Denying a guardian standing based on these antiquated case precedents is, in my judgment, an overly narrow reading of the statute that is neither in the best interest of the ward nor the public. I would therefore hold that the court should entertain the guardian's petition and perform its statutory obligation to determine whether a dissolution of marriage is in the best interest of the ward.

In re the MARRIAGE OF Herbert J. DREWS, Jr., by his Guardian, Lorraine DREWS,
Petitioner-Appellant,

and

Sue Ann Carrothers Drews,
Respondent-Appellee.

Appellate Court of Illinois, First District, Fourth Division.

No. 84-3019.

Dec. 19, 1985

Guardian instituted dissolution on behalf of ward. The Circuit Court, Cook County, Richard H. Jorzak, J., dismissed and guardian appealed. The Appellate Court, McMorrow, J., held that: (1) neither Illinois Probate Act nor Illinois Marriage and Dissolution of Marriage Act authorized or prohibited guardian from maintaining divorce action; (2) guardian generally lacks authority to institute action for dissolution of ward's marriage where the ward is unable to form an intelligent decision to seek such dissolution; and (3) guardian could not maintain the action on the basis of the substituted-judgment doctrine.

Affirmed.

Jiganti, P.J., dissented and filed an opinion.

1. Guardian and Ward

Statute, S.H.A. ch. 110 1/2, ¶11a-18(c), providing that guardian of estate shall appear for and represent the ward in all legal proceedings is merely a procedural statute specifying those individuals who may appear for and represent the ward; it is not substantive in nature and does not provide that a guardian may represent a ward in literally "all legal proceedings."

2. Mental Health

Provisions of the Illinois Probate Act dealing with duties of guardian, S.H.A. ch. 110 1/2, ¶¶11a-1 to 11a-23, do not authorize guardian's institution of marriage dissolution on behalf of ward, but do not prohibit it either.

3. Mental Health

Illinois Marriage and Dissolution of Marriage Act, S.H.A. Ch. 40, ¶302(a)(1), 403(a)(1), neither authorizes nor precludes guardian's institution of divorce action on behalf of ward.

4. Guardian and Ward

Common-law powers of guardians still exist where they are not inconsistent with Illinois statutory law.

5. Courts

If a rule stated in a case is the expression of opinion upon a point in a case deliberately passed upon the court, it is not "obiter dictum" but, rather, "judicial dictum" and nonetheless binding precedent.

See publication Words and Phrases for other judicial constructions and definitions.

6. Courts

Illinois Supreme Court obiter dicta are not binding authority, although they may be persuasive.

7. Mental Health

Guardian generally lacks authority to institute an action for dissolution of a ward's marriage where the ward is unable to perform (sic) an intelligent decision to seek such a dissolution; because there is no fault in a marriage that might not be forgiven by the spouse, the decision to seek marriage dissolution is a strictly personal right and a matter of personal choice and concern.

8. Mental Health

Guardian could not institute divorce action on behalf of ward under the substituted-judgment doctrine in the absence of any facts to support the conclusion that ward would have wanted to seek dissolution on any circumstances; even if ward might have expressed a desire to seek dissolution of his marriage under certain cir-

cumstances shown of record to have taken place subsequent to his enunciation of such an opinion, that in itself would not automatically be sufficient to grant the guardian the authority to institute the action.

Nye, Brent & Shoenberger, Ltd. (Constance F. Fisher, of counsel), Chicago, for petitioner-appellant.

Schiller, Du Canto and Fleck, Chicago, for respondent-appellee.

McMORROW, Justice:

Lorraine Drews (Lorraine), as legal guardian of her son Herbert Drews, Jr. (Herbert), filed a petition which requested dissolution of Herbert's marriage to Sue Ann Carrothers Drews (Sue Ann), distribution of their marital estate, maintenance for Herbert, and attorney's fees and costs. Sue Ann filed a motion to dismiss the petition, arguing that Lorraine, as guardian of Herbert, lacked the authority to file a petition for dissolution of the marriage. The trial court granted the motion to dismiss, and Lorraine appeals.

Briefly stated, Lorraine argues that the Illinois Probate Act (the Probate Act)(Ill.Rev.Stat.1983, ch. 110 1/2, pars. 101 *et seq.*) provides for a guardian's authority to institute dissolution proceedings on behalf of the ward; that Illinois case law does not expressly prohibit a guardian from instituting marriage dissolution proceedings; and that the doctrine of substituted judgment authorizes a guardian's maintenance of a divorce claim. Sue Ann contends that both the Probate Act and the Illinois Marriage and Dissolution of Marriage Act (the IMDMA)(Ill.Rev.Stat.1983, ch. 40, pars. 101 *et seq.*) prohibit a guardian from instituting marriage dissolution proceedings; that Illinois common law and the majority of other jurisdictions prohibit the institution of such proceedings; and that the doctrine of substituted judgment is inapplicable in the context of a guardian's authority to institute a dissolution action on behalf of a ward.

Based upon the broad purposes of the Probate Act and the IMDMA, the *dicta* of Illinois supreme court and appellate court decisions, the majority view of other jurisdictions, and the limited applicability of the substituted judgment doctrine, we conclude that under Illinois law a guardian is generally without the power to institute such proceedings. As a result we find no error in the trial court's dismissal of Lorraine's petition on the ground that she lacked the authority to institute marriage dissolution proceedings on Herbert's behalf.

FACTS

Sue Ann's motion to dismiss argued that Lorraine's petition failed to state a claim for which relief may be granted. (Ill.Rev.Stat.1983, ch. 110, par. 2-615.) Therefore all well-pleaded facts in the pleading are assumed to be true for the purposes of review. See *Knox College v. Celotex Corp.* (1981), 88 Ill.2d 407, 426, 58 Ill.Dec. 725, 430 N.E.2d 976.

In her verified petition for dissolution of marriage, Lorraine alleged that Herbert and Sue Ann were married on June 27, 1979; no children were born to the parties as a result of the marriage; and the couple had lived together from the date of the marriage until approximately May 1, 1981, on which date Herbert entered "residential placement for treatment."

At the time the petition was filed, Herbert was 31 years old and Sue Ann 28. Herbert was alleged to be "a permanently and totally disabled person, having sustained a grievous brain injury, * * * unemployed and * * * a resident" of a nursing home in Illinois. Sue Ann was alleged to be "employed and self-supporting."

Lorraine claimed in the petition that since the date of Herbert's entry into residential placement on May 1 1981, Sue Ann "has failed and refused to perform the duties of a wife under the circumstances and has abandoned [Herbert] to the care of his parents." Lorraine al-

leged that without any fault or provocation by Herbert, Sue Ann "has been guilty of desertion and extreme and repeated mental cruelty toward [him]."

Lorraine alleged that during the marriage, Herbert and Sue Ann were able to acquire certain assets which constituted marital property and that all of such property was in Sue Ann's possession. She also claimed that there were substantial marital debts arising out of Herbert's "accident" (the date of which was not stated anywhere in the petition), and his "consequent injuries," and that there were "enormous medical, hospital and nursing home bills." Lorraine stated that Herbert could not support himself, nor did he have the funds with which to maintain the dissolution proceeding or to pay his costs and attorney's fees. She alleged, however, that Sue Ann was able bodied and well able to support herself and that she was well able to pay Herbert's attorney's fees and court costs for the litigation of the cause.

Based upon these allegations, Lorraine requested that the marriage of Herbert and Sue Ann be dissolved, that their marital estate be equitably distributed, that Herbert be awarded maintenance from Sue Ann, and that Herbert be awarded from Sue Ann his attorney's fees and costs of suit.

In response to Lorraine's petition, Sue Ann filed a motion to dismiss for failure to state a claim (See Ill.Rev.Stat.1983, ch. 110, par. 2-615) in which she argued that Lorraine's guardianship power did not encompass the institution of dissolution proceedings, but instead, as requested in Lorraine's petition for guardianship, was limited to the institution of a personal injury action on Herbert's behalf based upon the accident which precipitated his disability, to the defense of a foreclosure action which had been instituted against him, and to the provision of his care and maintenance in view of his disability. Sue Ann argued that Lorraine's guardianship

power did not encompass the institution of marriage dissolution proceedings, and further that the right to file for dissolution of marriage is a personal one which can be exercised only by a spouse to the marriage.

Lorraine's response to the motion to dismiss claimed that her plenary guardianship over Herbert included the right to institute a divorce action on Herbert's behalf. She attached to her response a copy of Letters of Office granted her on November 12, 1982 which recited in pertinent part that she was "authorized to have the care, management and investment of the ward's estate and the custody of the ward and to do all things required by law."

Following a hearing, the trial court dismissed the petition with prejudice. Lorraine's timely appeal followed.[1]

OPINION

I.

Our analysis begins with a consideration of whether the Probate Act or the IMDMA specifically provide for or prohibit a guardian's institution of marriage dissolution proceedings. For the reasons stated below, we conclude that neither of the Acts specifically allows for nor precludes it.

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[1] In this appeal, Lorraine states in her appellate brief numerous facts beyond those presented in her original petition for dissolution of the marriage. Consequently, Sue Ann has filed before us a motion to strike Lorraine's statement of facts as contained in her appellate brief in this cause. Because we will consider only those factual matters properly of record, *i.e.*, those stated and well-pleaded in the original dissolution petition, we hereby deny Sue Ann's motion to strike a portion of Lorraine's appellate brief. We also do not consider Lorraine's argument that dismissal of her petition denied Herbert's procedural due process rights, as this argument was not raised before the trial court and was consequently waived. See *Swap Shop, Inc. v. M & R Amusement Corp.* (1981). 102 Ill.App.3d 926, 932, 58 Ill.Dec. 467, 430 N.E.2d 499.

Section 11a-18(c) of the Probate Act provides as follows (Ill.Rev.Stat.1983, ch. 110 1/2, par, 11a-18(c)):

> "The guardian of the estate of a ward shall appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose as guardian or next friend. This does not impair the power of any court to appoint a guardian ad litem or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute or defend any proceeding in his behalf."

[1] Well established rules of statutory construction require that "[t]he words used in a statute * * * be given their ordinary and popularly understood meaning" (*Kozak v. Retirement Board of Firemen's Annuity and Benefit Fund of Chicago* (1983), 95 Ill.2d 211, 215, 69 Ill.Dec. 177, 447 N.E.2d 394), and that the pertinent language be read in the context of the entire provision of which it forms an integral part. (*Estep v. Illinois Department of Public Aid* (1983), 115 Ill.App.3d 644, 647, 71 Ill.Dec. 402, 450 N.E.2d 1281.) Based upon these principles, we conclude that section 11a-18(c) merely specifies those individuals who may appear for and represent the ward. Its purpose is procedural in nature, in that it sets forth the guardian's authority to assume a legal role on behalf of the ward. Consequently we disagree with Lorraine's argument that the purpose of the provision is substantive in nature by providing that a guardian may represent a ward in literally "all legal proceedings." *Cf. In re Marriage of Kutchins* (1985), 136 Ill.App.3d 45, 48-49, 90 Ill.Dec. 722, 482 N.E.2d 1005.

We next consider whether a guardian's authority to institute divorce proceedings can be implied from various provisions of the Probate Act.

Article XIa of the Illinois Probate Act provides for the appointment of a guardian for a disabled adult. (Ill.Rev.Stat.1983, ch. 110 1/2, pars. 11a-1 to 11a-23.) It permits appointment of a guardian over the person of the

ward (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-3(a)(1)), the estate of the ward (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-3(a)(2)), or over both the person and estate of the ward (plenary guardianship). (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-3(a)(3).) Regarding the general purpose and scope of such guardianships, the Act states (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-3(b)):

> "Guardianship shall be utilized only as is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence. Guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations."

With regard to the duties of a guardian over the ward's personal estate, section 11a-17 provides *inter alia* that "[t]o the extent ordered by the court and under the direction of the court, the guardian of the person shall have custody of the ward and his minor and adult dependent children; [and] shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance and such provisional services as are appropriate * * *." (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-17(a)). It further specifies that the "guardian will assist the ward in the development of maximum self-reliance and independence." Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-17(a).

Section 11a-18 sets forth the duties of a guardian with regard to the ward's financial estate. It provides in pertinent part that the guardian shall have the care, management and investment of the estate, shall manage the estate frugally, and shall apply the income and principal thereof so far as necessary for the comfort and suitable support of the ward. Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-18(a).

[2] Our analysis of these sections leads us to find no explicit basis or duty for a guardian's institution of a marriage dissolution action on behalf of the ward. In fact we

observe that, to the extent that the Act refers to family and marital matters at all, it obligates the guardian 1) to care for the ward and his minor and adult dependent children, and to provide for their support, health, and education (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-17(a)); and 2) to manage the ward's estate "so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children, and *persons related by blood or marriage who are dependent upon or entitled to support from him* * * *." (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-18(a). (emphasis added)). Consequently the Act anticipates that the guardian's duties normally include an obligation to continue recognition of the ward's family and marital relationships, presumably on the theory that such recognition is in the best interests of the ward.

Nevertheless we also find unpersuasive Sue Ann's claim that the Probate Act precludes a guardian's institution of a divorce action because the Act does not expressly provide for it. This analysis is not well taken, for it assumes that the Probate Act specifically enumerates the actions which a guardian may undertake on behalf of a ward, whereas in fact no such specific listing is stated in the Act. Based upon Sue Ann's premise, the logical conclusion would be that the Act prohibits a guardian from instituting any claim on behalf of the ward since no specific enumeration is stated. This result was clearly not the intention of the Act, nor is it the law in Illinois. See Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-18(c); *Pyott v. Pyott* (1901), 191 Ill. 280, 61 N.E. 88.

[3] Our analysis of the IMDMA similarly reveals no guidance to a determination of the issue under review. Sue Ann claims in this regard that the IMDMA prohibits the instant suit and advances a comparative analysis of sections 302(a)(1) and 403(a)(1) of the IMDMA. (Ill.Rev.Stat.1983, ch. 40, pars. 302(a)(1), 403(a)(1)). Section 302(a)(1) provides that "either a party or the legal representative of a party lacking capacity to consent

may seek a declaration of invalidity [of a marriage]." (Ill.Rev.Stat.1983, ch. 40, par 302(a)(1).) Section 403(a)(1) requires that petitions for dissolution of a marriage be verified and state the age, occupation and residence of each party and his length of residence in this State. (Ill.Rev.Stat.1983, ch. 40, par. 403(a)(1).) Sue Ann argues that because section 403 does not provide for representation of a spouse/ward by a guardian, although section 302 does provide for such representation, the IMDMA prohibits a guardian from instituting a claim for dissolution of the ward's marriage.

This contention is flawed, however, since its application would preclude a guardian from appearing on behalf of a spouse who is a respondent in a dissolution action. Nevertheless Illinois law clearly permits this. (*Iago v. Iago* (1897), 168 Ill. 339, 48 N.E. 30; *Merneigh v. Merneigh* (1954), 2 Ill.App.2d 352, 119 N.E.2d 492.) Furthermore section 403(a) pertains to the necessary allegations of a dissolution petition; it does not address the question of which person may institute such proceedings. Section 302(a), on the other hand, is a codification of *Pyott v. Pyott* (1901), 191 Ill.280, 61 N.E. 88, which recognized the guardian's authority to institute an action for invalidity of a marriage on behalf of the ward. Accordingly there is no basis for comparison of the two sections.[2]

Based upon the analysis set forth above, we conclude that neither the Probate Act nor the IMDMA

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[2]In reliance upon *Higginbotham v. Higginbotham* (Mo.App.Ct.1940), 146 S.W. 856, in which the court observed that a guardian cannot commence a dissolution action because state law required verification of the dissolution petition by the spouse, Sue Ann argues that Illinois law prohibits a guardian from filing a dissolution petition because section 403(a) of the IMDMA requires that the petition be verified. (See Ill.Rev.Stat.1983, ch. 40, par. 403(a).)

(Footnote continued on the following page)

specifically determines whether a guardian is permitted to or prohibited from instituting an action to dissolve a ward's marriage to another.

II.

[4] Since the common law powers of guardians still exist where they are not inconsistent with Illinois statutory laws (*Gits v. Foremean* (1935), 360 Ill. 461, 467-68, 196 N.E. 434; *Hempstead v. Broad* (1916), 275 Ill. 358, 363, 114 N.E. 120; *Wright v. Comley* (1884), 14 Ill.App. 551, 553), we turn to an analysis of Illinois common law. In this regard the parties cite to three Illinois supreme court decisions (*Pyott v. Pyott* (1901), 191 Ill. 280, 61 N.E. 88; *Iago v. Iago* (1897), 168 Ill. 339, 48 N.E. 30; *Bradford v. Abend* (1878), 89 Ill. 78) and one Illinois appellate court decision. *Newman v. Newman* (1963), 42 Ill.App.2d 203, 191 N.E.2d 614.

[5, 6] The parties' arguments raise the question of whether these decisions constitute *stare decisis* with regard to the issue under review, or whether they are instead mere *obiter dicta.* If a rule stated in a case is "the expression of opinion upon a point in a case deliberately passed upon by the court" it is not *obiter dictum* but rather judicial *dictum* and nonetheless binding precedent. (*Scovill Manufacting Co. v. Cassidy* (1916), 275 Ill. 462, 470, 114 N.E. 181.) Consequently "[w]hether a legal proposition stated in an opinion is *obiter dictum* is to be determined from a reading of the entire opinion. If the opinion expressed on a

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2 *(Continued)*

Sue Ann cites no Illinois decision which holds that such verification requirement is jurisdictional (as the *Higginbotham* court held). Parenthetically we also observe that Missouri law may no longer hold such verification to be jurisdictional. (See *McCammon v. McCammon* (Mo.App.Ct.1984), 680 S.W.2d 196, 200.) Accordingly we decline to hold here that the verification requirement of the IMDMA constitutes a bar to a guardian's institution of a dissolution claim on behalf of the disabled spouse.

legal question is one casually reached by the court on an issue unrelated to the essence of the controversy or based on hypothetical facts, then it is *obiter dictum.*" *(Larson v. Johnson* (1953), 1 Ill.App.2d 36, 40, 116 N.E.2d 187; *see also Community Renewal Society v. Department of Labor* (1982), 108 Ill.App.3d 773, 779, 64 Ill.Dec. 310, 439 N.E.2d 975.) Illinois supreme court *obiter dicta* are not binding authority, although they may be persuasive. *Williams v. Crickman* (1980), 81 Ill.2d 105, 113, 39 Ill.Dec. 820, 405 N.E.2d 799.

Our analysis of the above-referenced cases leads us to conclude that they serve only as *dicta* for the proposition that a guardian lacks the power to institute a marriage dissolution action. *Bradford v. Abend* (1878), 89 Ill. 78 held that a disabled spouse's conservator possessed the authority to institute an action to vacate a divorce judgment, on the ground that the prior decree, although founded upon the disabled spouse's petition for dissolution of the marriage, had been nevertheless obtained through fraud. In *Iago v. Iago* (1897), 168 Ill. 339, 48 N.E. 30, the court concluded that the disabled spouse's legal representative could also institute an action to vacate a prior divorce decree under circumstances where the divorce had been granted upon the competent spouse's petition for dissolution. *Pyott v. Pyott* (1901), 191 Ill. 280, 61 N.E. 88 concerned the question of whether a spouse's guardian could institute an action to annul a marriage. In *Newman v. Newman* (1963), 42 Ill.App.2d 203, 191 N.E.2d 614, the court determined that the disabled spouse's appointed legal representative possessed the authority to institute an action to modify the terms of a previously entered divorce judgment. In each of these decisions the courts' references to a guardian's lack of authority to institute divorce proceedings was collateral to the courts' analyses and conclusions.

We also consider the recent decision of *In re Marriage of Kutchins* (1985), 136 Ill.App.3d 45, 90 Ill.Dec. 722, 482 N.E.2d 1005, in which the court's holding was "limited to the single proposition that one who has been adjudged to be a disabled person and for whom an estate guardian has been appointed, has legal capacity to sue for dissolution of marriage." The court noted the majority rule of other jurisdictions to the effect that "a mentally incompetent person cannot sue for dissolution of marriage, either on his own behalf or by a guardian or next friend" and further commented that "Illinois has long since followed this rule," citing to *Bradford v. Abend* and *Iago v. Iago*. Nevertheless the court's analysis was centered upon a consideration of whether "the appointment of a guardian of the estate is a sufficient finding of incompetency which would bar the ward from seeking a dissolution of marriage." (136 Ill.App.3d 45, 49, 90 Ill. Dec. 722, 482 N.E.2d 1005.) The court concluded that appointment of an estate guardian was insufficient in and of itself to preclude a ward's institution of such proceedings, reasoning that a finding of disability to manage one's estate or financial affairs "is a different and more demanding test of mental competency than is applicable to determining whether [a ward] is competent to enter into or dissolve a marriage." (136 Ill.App.3d 45, 48, 90 Ill.Dec. 722, 482 N.E.2d 1005.) Because the court in *Kutchins* was concerned with the capacity of a disabled spouse to institute dissolution of marriage proceedings where a guardian had been appointed over the spouse's estate, we conclude that its reference to the authority of a plenary guardian to commence such an action was *obiter dictum*.

As a result we find no clear precedent in the above decisions that a guardian may never institute a dissolution of marriage action on behalf of the ward. Instead they establish that 1) a guardian or next friend may institute an action to vacate a divorce decree entered against the disabled and without guardian or next friend protection

(*Iago v. Iago*; *Bradford v. Abend; Newman v. Newman*), and 2) a guardian or next friend may institute an action on behalf of a ward to annul a marriage entered into by the disabled person during a period of mental disability. (*Pyott v. Pyott*) One of these decisions futher noted that a guardian may represent a ward in defense of a dissolution petition wherein the ground for dissolution occurred prior to the commencement of the disability (*Iago v. Iago*, 168 Ill. 339, 341, 48 N.E. 30), a rule which has been relied upon in a subsequent Illinois appellate court case. (*Merneigh v. Merneigh* (1954), 2 Ill.App.2d 352, 119 N.E.2d 492.) It has also been recently held that a spouse possesses sufficient mental capacity to determine intelligently that the spouse desires dissolution of the marriage. *In re Marriage of Kutchins* (1985), 136 Ill.App.3d 45, 90 Ill.Dec. 722, 482 N.E.2d 1005.

III.

Although the decisions considered above do not rise to the level of *stare decisis* with regard to the issue presently before us, nevertheless they remain persuasive authority on the question. In addition the decisions of other jurisdictions, while not binding upon this court, present some guidance to a determination of the present cause. On this basis, then, we consider the persuasive value of the decisional law of Illinois and other jurisdictions in tandem.

Our research reveals that 16 jurisdictions have considered the question of whether a guardian possesses the authority to institute dissolution of marriage proceedings on behalf of the disabled spouse. Of these, 12 have determined that a guardian lacks such power, reasoning that the guardian's authority was strictly regulated by a statute which did not provide for such power, or that the decision to seek dissolution of a marriage is an inherently personal right, the exercise of which cannot or should not be delegated to a guardian. (See *Wood v. Beard* (Fla.App.Ct.1958), 107 So.2d 198, 199-201; *Phillips v.*

Phillips (1947), 203 Ga. 106, 108-12, 45 S.E.2d 621; *State ex rel. Quear v. Madison Circuit Court* (1951), 229 Ind. 503, 506-08, 99 N.E.2d 254); *Mohler v. Shank's Estate* (1895), 93 Iowa 273, 279-80, 61 N.W. 981; *Birdzell v Birdzell* (1885), 33 Kan. 433, 435-36, 6 P. 561; *Johnson v. Johnson* (1943), 294 Ky. 77, 78, 170 S.W.2d 889; *Higginbotham v. Higginbotham* (Mo.App.Ct.1940), 146 S.W.2d 856, 857; *In re Jennings* (1981), 187 N.J.Super. 55, 58-59, 453 A.2d 572; *Mohrmann v. Kob* (1943), 291 N.Y. 181, 187-90, 51 N.E.2d 921; *Freeman v. Freeman* (1977), 34 N.C.App. 301, 303-04, 237 S.E.2d 857; *Turner v. Bell* (1955), 198 Tenn. 232, 245-54, 279 S.W.2d 71; *Dillion v. Dillion* (Tex.Civ.App.1925), 274 S.W. 217, 217-20; *see generally* Annot., 6 A.L.R.2d 681 (1966 & 1984 supp.).) Of the four jurisdictions which permit a guardian to institute a dissolution action, two so hold on the basis of statutory interpretation (*see Campbell v. Campbell* (1941), 242 Ala. 141, 142-43, 5 So.2d 401; *Cohn v. Carlisle* (1941), 310 Mass. 126, 128-29, 37 N.E.2d 260), and two so found because the ward was determined to possess sufficient mental capacity to consent intelligently to dissolution of the marriage. *In re Marriage of Higgason* (1973), 10 Cal.3d 476, 483-85, 110 Cal.Rptr. 897, 516 P.2d 289 (*en banc*); *Boyd v. Edwards* (1982), 4 Ohio App.3d 142, 446 N.E.2d 1151.

[7] Upon considered reflection of the holdings and reasoning of the jurisprudence of this State as well as that of other jurisdictions, we determine the better view is that a guardian generally lacks the authority to institute an action for dissolution of a ward's marriage where the ward is unable to form an intelligent decision to seek such dissolution.

We are particularly persuaded by the consideration that, because there is no fault in a marriage that might not be forgiven by a spouse, the decision to seek marriage dissolution is a strictly personal right and a matter of personal choice and concern. Indeed, the courts in *Iago*, *Pyott*, *Newman*, and *Kutchins* all specifically recognized, albeit in

dicta, that "the right to sue for an absolute divorce is a personal right and requires the intelligent action of the injured party * * *." (*Pyott v. Pyott* (1901), 191 Ill. 280, 288, 61 N.E. 88; see also *Iago v. Iago* (1897), 168 Ill. 339, 341, 48 N.E. 30; *Newman v. Newman* (1963), 42 Ill.App.2d 203, 213, 191 N.E.2d 614; *In re Marriage of Kutchins* (1985), 136 Ill.App.3d 45, 47, 90 Ill.Dec. 722, 482 N.E.2d 1005.) In addition we note that Illinois has long recognized and honored the sanctity of the marital bond. In fact the stated purpose of the IMDMA itself is to " strengthen and preserve the integrity of marriage and safeguard family relationships * * *." (Ill.Rev.Stat.1983, ch. 40, par. 102(2).) This policy indicates "a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will." *Hewitt v. Hewitt* (1979), 77 Ill.2d 49, 64, 31 Ill.Dec. 827, 394 N.E.2d 1204; *see also Jarrett v. Jarrett* (1979), 78 Ill.2d 337, 345, 36 Ill.Dec. 1, 400 N.E.2d 421.

Furthermore we are equally mindful of the consideration that dissolution of a marriage has an enormous impact not only upon the ward, but also upon the ward's spouse. Dissolution severs, terminates, and extinguishes an entire panoply of legal, social, family, and personal rights, benefits, advantages, and opportunities. Given the magnitude of these consequences, we determine that the decision to so radically transmute a relationship is usually best exercised by the partners to the marriage, rather than by someone alien to it.

IV.

Lorraine proposes that this court adopt decisions of other states which recognize that the guardian possesses the authority to make certain "personal" decisions on behalf of the ward based upon the doctrine of substituted judgment, and extend application of this doctrine to the context of marriage dissolution proceedings.

The doctrine of substituted judgment requires the

court to "don the mental mantle of the incompetent" (*In re Carson* (1962), 39 Misc.2d 544, 545, 241 N.Y.S.2d 288), to "substitute itself as nearly as may be for the incompetent, and to act upon the same motives and considerations as would have moved her." (*City Bank Farmers Trust Co. v. McGowan* (1945), 323 U.S. 594, 599, 65 S.Ct. 496, 498, 89 L.Ed. 483.) In its traditional conception, the rule authorized the court to permit gifts from the disabled ward's estate to persons to whom the ward owed no duty of support. See *In re Whitbread, a Lunatic* (1816), 2 Mer.Rep. 99, 35 Eng.Rep. 878; *In re Buckley's Estate* (1951), 330 Mich. 102, 47 N.W.2d 33; *see also In re Guardianship of Bohac* (Fla.App.Ct.1980), 380 So.2d 550 (gift for tax and estate planning purposes).) In its more contemporary conception the doctrine has been expanded in order to serve as a justification for authorization of a guardian's consent to certain medical treatments on behalf of the ward. *See, e.g., Strunk v. Strunk* (Ky.App.Ct.1969), 445 S.W.2d 145 (renal transplant); *In re Guardianship of Moe* (1982), 385 Mass. 555, 432 N.E.2d 712 (sterilization); *In re Guardianship of Roe* (1981), 383 Mass. 415, 421 N.E.2d 40 (forcible administration of antipsychotic drugs); *Superintendent of Belchertown State School v. Saikewicz* (1977), 373 Mass. 728, 370 N.E.2d 417 (refusal of chemotherapy); *In re Conroy* (1985), 98 N.J. 321, 486 A.2d 1209, *modifying In re Quinlan* (1976), 70 N.J. 10, 355 A.2d 647 (withdrawal of lifesupport systems); *In re Guardianship of Ingram* (1984), 102 Wash.2d 827, 689 P.2d 1363 (radiation or surgery).

[8] However in our view the facts of the present case are analogous to neither the traditional nor the contemporary conception of the substituted judgment doctrine. The record of the instant case fails to establish any facts to support the conclusion that Herbert would have wanted to seek dissolution of his marriage to Sue Ann under any circumstances. Furthermore even assumming *arguendo* that Herbert might have expressed a desire to seek dissolution of his marriage to Sue Ann under certain circumstances

shown of record to have taken place subsequent to his enunciation of such an opinion, we are unpersuaded that this in itself would automatically be sufficient to grant Lorraine the authority she requests. In our view marriage is an on-going, flexible, and fluid relationship of consent and compromise between two persons, which accords to both parties the right and prerogative to shift, alter, or rearrange their ideas, values, or patterns of behavior. In view of the personal nature of a decision to divorce and the significant consequences to both spouses which are attendant to such a decision, we determine that the fact that some conduct of one spouse may be sanctioned as grounds for dissolution of a marriage under the IMDMA would not *ipso facto* justify a guardian's institution of marriage dissolution proceedings. Nor would the simple fact that the ward, in the past, may have then perceived in the abstract that such behavior would be sufficient cause to seek dissolution of a marriage. Accordingly we find Lorraine's argument insufficient basis to reverse the decision of the trial court here.

CONCLUSION

Based upon the reasoning set forth above, we conclude that under Illinois law a guardian is generally without the authority to commence a marriage dissolution proceeding on behalf of the ward. Parenthetically we recognize the possibility that there may be compelling instances where it could be clearly shown that dissolution of the ward's marriage "is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence" (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-3(b)) such that Illinois law might consider granting the guardian the power to institute such a claim. Nevertheless in our view the instant cause fails to present a compelling factual situation wherein dissolution of the ward's marriage would clearly serve any of these goals of the Probate Act. Our review of Lorraine's plead-

ings indicates that they are insufficient to establish *prima facie* facts clearly demonstrating that dissolution would be in Herbert's best interests. Lorraine has been appointed plenary guardian of Herbert's estate, and there is no allegation or inference of concern that Sue Ann might mismanage or dissipate it. Further, because Herbert is allegedly "a permanently and totally disabled person," there is no reasonable inference that Sue Ann's marital companionship, comfort, or support, or the absence of any of these, causes him any mental, emotinal, cognitive, or physical harm, trauma, or damage. In terms of his needs and interest, it would serve none of the stated purposes of the Probate Act to grant Herbert a dissolution of his marriage in the present assumed factual setting. As a result we conclude that the trial court properly dismissed Lorraine's petition for failure to state a claim for which relief could be granted.

For the reasons stated, the order of the trial court is affirmed.

AFFIRMED

JOHNSON, J., concurs.

JIGANTI, P.J., dissents.

JIGANTI, Presiding Justice, dissenting:

Lorraine Drews was appointed by the court as the plenary guardian (Ill.Rev.Stat.1983, ch. 110 1/2, par. 11a-3(a)) of her 31 year old son, Herbert J. Drews, Jr. She filed to have her son's marriage to Sue Ann Drews dissolved. The guardian alleged that her ward is permanently and totally disabled because of a brain injury; that his wife abandoned him to the care of his parents; that during the course of their marriage they had acquired certain assets constituting marital property which were in the wife's possession; that the wife is able bodied and able to support herself; and that there are substantial marital debts and

enormous medical bills. In the guardian's petition to dissolve the marriage she requests that the marital estate be equitably distributed and that the ward be awarded maintenance from his wife.

The wife filed a motion to dismiss contending that the right to file for a dissolution of a marriage is a personal right and must be brought by the spouse and cannot be maintained by a guardian on behalf of her ward. The trial court granted the motion. The result of granting the motion was of course to hold as a matter of law, at least under this factual setting, that a plenary guardian of the person and the estate has no legal right to seek a marriage dissolution. As a consequence, the court then cannot exercise its discretionary authority in determining whether the guardian's actions were in the ward's best interests.

The majority in considering this issue finds that there is nothing in either the Probate Act or in the IMDMA which either provides for or excludes the institution of the dissolution proceeding by the guardian. Further the majority finds that there is no precedent in the decisions that it examined which holds that a guardian may never institute a dissolution of marriage action. It concludes, however, that the guardian *generally* lacks the authority or power to institute an action for dissolution. It reaches this conclusion because it believes that the decision to seek a marriage dissolution is strictly a personal right and that the dissolution of marriage has an enormous impact upon both the ward and the spouse.

I respectfully dissent from the holding and from the reasoning of the majority. I believe that the right to seek a divorce is encompassed within the duties of a plenary guardian who is charged with the responsibility of acting in the ward's best interests. Upon appointment as a guardian, the guardian is empowered to make all necessary decisions concerning the ward's best interests. (Ill.Rev.Stat.1983,

ch. 110 1/2, pars. 11a-17 and 11a-18.) Given such broad authority, the court has the discretionary authority under the statute to determine whether the guardian's actions are for the ward's best interests. I fail to see why in the instant case it should be found as a matter of law that a guardian may not seek the dissolution of the ward's marriage when it has been alleged that dissolution is for the ward's best interests. Whether dissolution is appropriate here is for the trial court to determine within its discretionary power.

In considering the fact that the marriage dissolution is strictly a personal right the majority expresses a noble sentiment when it says that in a marriage there is no fault that may not be forgiven. To a totally and permanently disabled ward who has been abandoned and deprived of a portion of his marital estate and is in no position to forgive, the sentimentality lacks substance. Still considering this idea that marriage dissolution is a personal right that cannot be exercised by a guardian, other courts have found that the guardian may consent to an operation(*In re Guardianship of Roe* (1981), 383 Mass. 415, 421 N.E.2d 40 Sterilization (*In re Matter of Mary Moe* (1982), 385 Mass. 555, 432 N.E.2d 712), donation of a kidney (*Strunk v. Strunk* (Ky.App.Ct.1969), 445 S.W.2d 145) and even consent to remove life support systems and allow the ward to die. (*In re Conroy* (1985), 98 N.J. 321, 486 A.2d 1209, *modifying In re Quinlan* (1976), 70 N.J. 10, 355 A.2d 647.) No more personal is the right to dissolve a marriage.

I would reverse this dismissal that was based on the pleadings. This matter should be remanded to that part of the trial court which established the guardianship. That judge should thoroughly consider all of the circumstances regarding the alleged abandonment and marital estate matters and determine whether the guardian's initiation of marriage dissolution proceedings is in the ward's best interests.

CONSTITUTION OF UNITED STATES AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT
Ill.Rev.Stat., Chap. 40 (1985)

306. Commencement of action

Actions for declaration of invalidity of marriage shall be commenced as in other civil cases.

P.A.80-923, § 306, eff. Oct. 1, 1977.

401. Dissolution of marriage

§ 401. Dissolution of Marriage. (a) The court shall enter a judgment of dissolution of marriage if at the time the action was commenced, one of the spouses was a resident of this State or was stationed in this State while a member of the armed services, and the residence or military presence had been maintained for 90 days next preceding the commencement of the action or the making of the finding; provided, however, that a finding of residence of a party in any judgment entered under this Act from January 1, 1982 through June 30, 1982 shall satisfy the former domicile requirements of this Act; and if one of the following gounds for dissolution has been proved:

(1) That, without cause or provocation by the petitioner: the respondent was at the time of such marriage, and continues to be naturally impotent; or the respondent had a wife or husband living at the time of such marriage; or the respondent had committed adultery subsequent to the marriage, or has wilfully deserted or absented himself or herself from the petitioner for the space of one year, including any period during which litigation may have pended between the spouses for dissolution of marriage or legal separation, or has been guilty of habitual drunkenness for the space of 2 years, or has been guilty of gross and confirmed habits caused by the excessive use of addictive drugs for the space of 2 years, or has attempted the life of the other by poison or other means showing malice or has been guilty of extreme and repeated physi-

cal or mental cruelty, or has been convicted of a felony or other infamous crime or has infected the other with a communicable veneral disease. "Excessive use of addictive drugs", as used in this Section, refers to use of an addictive drug by a person when using the drug becomes a controlling or a dominant purpose of his life; or

(2) That the spouses have lived separate and apart for a continuous period in excess of 2 years and irreconcilable difference have caused the irretrievable breakdown of the marriage and the court determines that efforts at reconciliation have failed or that future attempts at reconciliation would be impracticable and not in the best interests of the family; provided that if the spouses have lived separate and apart for a continuous period of not less than 6 months next preceding the entry of the judgment dissolving the marriage, as evidenced by testimony or affidivits of the spouses, the requirement herein of living separate and apart for a continuous period in excess of 2 years may be waived upon written stipulation of both spouses filed with the court. At any time after the parties cease to cohabit, any period of cohabitation under written agreement of the parties to attempt to reconcile shall be included in the period of separation.

In computing the period during which the spouses have lived separate and apart for puposes of this Section, periods during which the spouses were living separate and apart prior to July 1, 1984 are included.

(b) Such judgment shall not be entered unless, to the extent it has jurisdiction to do so, the court has considered, approved, reserved or made provision for child custody, the support of any child of the marriage entitled to support, the maintenance of either spouse and the disposition of property. The court may enter a judgment for dissolution which reserves any such issues either upon (i) agreement of the parties, or (ii) motion of either party and a finding by the court that appropriate circumstances exist.

The death of a party subsequent to entry of a judgment for dissolution but before judgment on reserved issues shall not abate the proceedings

If any provision of this Section or application thereof shall be adjudged unconstitutional or invalid for any reason by any court of competent jurisdiction, such judgment shall not impair, affect or invalidate any other provision or application of this Section, which shall remain in full force and effect.

PROBATE ACT OF ILLINOIS OF 1975
Ill.Rev.Stat., Ch. 110 1/2, sec. 11a-17

11a-13. Duties of personal guardian

§ 11a-17. Duties of personal guardian. (a) To the extent ordered by the court and under the direction of the court, the guardian of the person shall have custody of the ward and his minor and adult dependent children; shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance and such professional services as are appropriate but the ward's spouse may not be deprived of the custody and education of the ward's minor and adult dependent children without the consent of the spouse, unless the court finds that the spouse is not a fit and competent person to have such custody and education. The guardian will assist the ward in the development of maximum self-reliance and independence. The guardian of the person may petition the court for an order directing the guardian of the estate to pay an amount periodically for the provision of the services specified by the court order. If the ward's estate is insufficient to provide for education and the guardian of his person fails to provide education, the court may award the custody of the ward to some other person for the purpose of providing education. If a person makes a settlement upon or provision for the support or education of a ward, the court may make such order for the visitation of the ward by the person making the settlement or provision as the court deems proper.

(b) If the court directs, the guardian of the person shall file with the court at intervals indicated by the court, a report which shall state briefly: (1) the current mental, physical, and social condition of the ward and his minor and adult dependent children; (2) their present living arrangement, and a description and the address of every residence where they lived during the reporting period and the length of stay at each place; (3) a summary of the medical, educational, vocational, and other professional services

given to them; (4) a resume of the guardian's visits with and activities on behalf of the ward and his minor and adult dependent children; (5) a recommendation as to the need for continued guardianship; (6) any other information requested by the court or useful in the opinion of the guardian. The Office of the State Guardian shall assist the guardian in filing the report when requested by the guardian. The court may take such action as it deems appropriate pursuant to such report.

PROBATE ACT OF ILLINOIS OF 1975
Ill. Rev. Stat. Ch.110 1/2, sec. 11a-18

§ 11a-18. Duties of the estate guardian.

(a) To the extent specified in the order establishing the guardianship, the guardian of the estate shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children, and persons related by blood or marriage who are dependent upon or entitled to support from him, or for any other purpose which the court deems to be for the best interests of the ward, and the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interest. The guardian may make disbursement of his ward's funds and estate directly to the ward or other distributee or in such other manner and in such amounts as the court directs. If the estate of a ward is derived in whole or in part from payments of compensation, adjusted compensation, pension, insurance or other similar benefits made directly to the estate by the Veternas Administration, notice of the application for leave to invest or expend the ward's funds or estate, together with a copy of the petition and proposed order, shall be given to the Veteran's Administration Regional Office in this State at least 7 days before the hearing on the application.

(b) Upon the direction of the court which issued his letters, a guardian may perform the contracts of his ward which were legally subsisting at the time of the commencement of the ward's disability. The court may authorize the guardian to execute and deliver any bill of sale, deed or other instrument.

(c) The guardian of the estate of a ward shall appear for and represent the ward in all legal proceeding unless another person is appointed for that purpose as guardian

or next friend. This does not impair the power of any court to appoint a guardian ad litem or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute or defend any proceeding in his behalf.

(d) Adjudication of disability shall not revoke or otherwise terminate a trust which is revocable by the ward. A guardian of the estate shall have no authority to revoke or amend a trust that is revocable or amendable by the ward, except that the court may authorize a guardian to revoke a Totten trust or similar deposit or withdrawable capital account in trust to the extent necessary to provide funds for the purposes specified in paragraph (a) of this Section. If the trustee of any trust for the benefit of the ward has discretionary power to apply income or principal for the ward's benefit, the trustee shall not be required to distribute any of the income or principal to the guardian of the ward's estate, but the guardian may bring an action on behalf of the ward to compel the trustee to exercise the trustee's discretion or to seek relief from an abuse of discretion. This paragraph shall not limit the right of a guardian of the estate to receive accountings from the trustee on behalf of the ward.

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
DOMESTIC RELATIONS DIVISION

IN RE THE MARRIAGE OF:
HERBERT J. DREWS, JR.,
by his guardian, LORRAINE
DREWS,

Petitioner,

and

SUE ANN CARROTHERS
DREWS,

Respondent.

No. 83D 15641

MEMORANDUM OF LAW ON AUTHORITY TO PROSECUTE AN ACTION FOR DISSOLUTION OF MARRIAGE ON BEHALF OF WARD

THE FACTS

HERBERT DREWS sustained a massive closed head injury in an automobile accident. Thereafter, following a long hospitalization, he was sent home in the care of his wife, SUE ANN CARROTHERS DREWS, to further recuperate from his injuries. During the several months at home, HERBERT DREWS was to take Dilantin to control seizures which were the result of his closed head injury, and was otherwise to be medicated and to undergo treatment and therapy. It is petitioner's contention that SUE ANN deliberately refused to manage HERBERT's care as prescribed and otherwise neglected and abused him until, at last, he suffered a series of massive seizures which left him totally physically and mentally disabled. He has resided for several years in skilled nursing facilities. He has no volitional activity; he cannot sit up without support; he cannot speak; he cannot control or coordinate the movements his limbs; he cannot feed himself.

During the period following HERBERT's injury, the small business he owned and the condominium in which he resided with SUE ANN were lost by reason of SUE ANN's failure and refusal to act to preserve those assets. Although informed and encouraged as to the right and necessity for bringing suit against the driver of the car which caused the accident, and although she had been repeatedly warned about the statute of limitations, SUE ANN failed and refused to take the necessary steps and file the lawsuit. Further, she continued in a course of wilful neglect and abuse of HERBERT, so that in 1982, HERBERT's mother, LORRAINE DREWS, in Case No. 82 P 7208, petitioned for guardianship of the estate and person of HERBERT so that she could properly manage his affairs.

During the course of the guardianship proceeding, SUE ANN consented to LORRAINE's becoming plenary guardian of HERBERT and testified that it was her wish that LORRAINE be named guardian. On November 12, 1982, HERBERT was adjudicated a disabled person and LORRAINE was named his guardian. A copy of the letters of office are attached hereto and by this reference are incorporated herein. Before and since that date, SUE ANN has totally abrogated any and all responsibility for HERBERT's care, has visited him only a handful of times, and on the rare occasions of any contact with him, she has behaved cruelly, negligently and irresponsibly, causing him disruption and distress and at times actually endangering him by her negligent and irresponsible conduct.

HERBERT is totally without mentation and appears to be equally without cognition. He does not know anyone. He responds instinctively but primitively and irregularly to the appearance of a kindly person and the sound of a kindly voice. He becomes agitated and combative without warning and for no apparent reason, although disruption seems to exacerbate the likelihood of seizure and agitation. There is no hope of recovery for HERBERT; the damage to

his brain is too extensive and is irreversible. He will require skilled nursing care for the remainder of his life. His health, except for his brain injury, is excellent. He is expected to live as long as thirty-five to forty years. The most that can be hoped for is that – with very highly skilled rehabilitation programming over a protracted period of time – he may be trained at least to feed himself and gain some control over him limbs.

HERBERT has been a patient at Lutheran General Hospital, Northwest Community Hospital, Alexian Brothers, Schwab Rehabilitation Center and the Rehabilitation Institute of Chicago. Even these outstanding facilities cannot match the very sophisticated program available at an east coast facility, and it is to that facility that LORRAINE wishes to take HERBERT for rehabilitation treatment and training if and when funds are available.

HERBERT has no money. He is presently receiving Public Aid benefits which keep him in his present skilled nursing facility and provide for his medical care. If the lawsuit prosecuted on HERBERT's behalf by LORRAINE is successful, there will be a substantial award to HERBERT, and that will be the only asset in his estate. Those funds, if they ever materialize, will be subject to a claim for reimbursement by Public Aid for benefits it has paid. Every cent of the remainder will be needed to pay for HERBERT's care and treatment for the rest of his life. The proceeds would likewise be subject to a claim from SUE ANN for a share and for maintenance. It is partly to adjudicate the matter of HERBERT's estate and any claim of SUE ANN to it, and partly to bring to an end once and for all the "open casket marriage" which – although there is no marital relationship and no hope of there ever being one – lies moldering in the center of HERBERT's world to his great detriment, that LORRAINE DREWS, plenary guardian of the estate and person of HERBERT DREWS, brings this action on his behalf.

THE ISSUE

SUE ANN, by her able counsel, has moved to strike and dismiss the petition herein in the main on the basis that divorce is traditionally stated to be a personal right of action and that a guardian does not have the right to bring and maintain such an action on behalf of her ward. It is this issue which the Court is asked to address.

THE LAW

The Probate Act of Illinois, Ch. 110a, Ill. Rev. Stat., states in pertinent part as follows:

> "11a-17. Duties of personal guardian.] (a) To the extent ordered by the court and under the direction of the court, the guardian of the person shall have custody of the ward . . . ; shall procure for them and shall make provision for their support, care comfort, health, education and maintenance and such professional services as are appropriate . . . The guardian will assist the ward in the development of maximum self-reliance and independence. . . .
>
> "11a-18. Duties of the estate guardian.] (a) To the extent specified in the order establishing the guardianship, the guardian of the estate shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward . . . and persons related to him by blood or marriage who are dependent upon or entitled to support from him, or for any other purpose which the court deems to be for the best interests of the ward, and the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interests. . .
>
> "(c) The guardian of the estate of the ward shall appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose as guardian or next friend. This does

> not impair the power of any court to appoint a guardian ad litem or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend to commence, prosecute or defend any proceeding in his behalf. (Amended by Public Act 81-795, effective September 16, 1979.)"

There is some old case law in Illinois which has been quoted and interpreted as holding that, inasmuch as dissolution is a personal right and requires the intent of the petitioner, an action for dissolution cannot be brought either by a person who has been adjudicated a disabled person and for whom a plenary guardian has been appointed (formerly, an "incompetent") or by his guardian. The seminal case is *Bradford v. Abend* (1878), 89 Ill. 78. In *Bradford*, a bill in chancery was brought by the wife's conservator to set aside a divorce decree which had been rendered under the following circumstances: the wife was insane and was in an asylum out of Illinois and "beyond the jurisdiction of our courts." (89 Ill. 78 at 81). An action for divorce was filed in her name. On the same day the suit was filed, and with no service having been made on the defendant husband, the husband appeared and answered, the case was heard, and a decree of divorce was entered. It is to be noted that at the time of the filing and decree, the wife had apparently not been adjudicated incompetent, and she was not represented in the action by a conservator or, presumably, anyone else. In upholding the chancery court's voiding of the decree, the reviewing court stated as follows:

> "... It is a matter of no consequence who advised the filing of this bill, whether it was done by friends and relatives or other persons. Being insane, she could give no consent to the proceedings had in the divorce case, and hence everything that was done in her name was invalid. Consent involves an act of reason, and when one is bereft of reason, it follows there can be no consent given that comes from reflection. It is said to be a rule of universal application, that *where a party is unable,*

> *in consequence of mental weakness, to protect himself, equity will lend its aid that no injustice will be done.* Whether there was any fraud in fact, the law will presume fraud from the unequal position of the parties in this case, and that will vitiate the decree." (89 Ill. 78 at 81) (emphasis supplied)

The *Bradford* court acted to set aside a divorce decree which it found to have been clearly a fraud upon the wife. It so acted to preserve her rights to support and to prevent her from being cast aside by her husband who attempted "to rid himself of his wife, on account of the misfortunes that had overtaken her" (page 79). Nowhere in the opinion was there any mention of the capacity or right of a conservator or guardian to bring an action in divorce on behalf of his ward.

The next case to appear in this state dealing with the capacity of a personal representative to act on behalf of an incompetent in a divorce case is *Iago v. Iago*, 168 Ill. 339, 48 N.E. 30, 39 L.R.A. 115 (1897). In *Iago*, the next friend of the defendant husband brought a writ of error to reverse a divorce decree entered against him in a proceeding begun after he became insane. A guardian ad litem had been appointed for him by the trial court. The issue on appeal was (a) whether a next friend of an insane person has capacity to prosecute a writ of error in his behalf to reverse a divorce decreee, and (b) whether it is essential that the same person who acted as guardian ad litem in the divorce proceeding must be the one to appear in prosecuting the writ of error, or whether the court may appoint or accept another person in that capacity. The court was not asked to rule on the capacity of a guardian to prosecute an action for divorce on behalf of an incompetent, nor did it rule on that issue. It stated as *obiter dictum* (at page 341) that "It seems well settled the right to sue for an absolute divorce is a personal right and requires the intelligent action of the injured party, for which reason it has been frequently held a guardian or next friend of an insane person cannot

maintain a suit for absolute divorce for his ward." The court offers no authority for this position. In the list of authorities cited by the defendant in error, *Bradford v. Abend*, 89 Ill. 78, is the only case offered as authority that "A guardian of an insane person cannot therefore maintain a suit for an absolute divorce in favor of his ward." (page 341). A glance at *Bradford* will demonstrate beyond any doubt that *Bradford* makes no such ruling, as remarked hereinabove.

Pyott v. Pyott, 191 Ill. 280, 61 N.E. 88 (1901) addressed the capacity of a guardian to prosecute a proceeding to annul the marriage of a person who was *non compos mentis* at the time of his marriage on the ground that since the person lacked capacity, the marriage was void *ab initio*. The *Pyott* court refers to *Iago*, 168 Ill. 339, stating "The doctrine that the right to sue for an absolute divorce is a personal right and required the intelligent action of the injured party, and for that reason the guardian or conservator of an insane person cannot maintain a suit for divorce for his ward, to which *reference* is made in *Iago v. Iago*, 168 Ill. 339 . . . *It is well settled the guardian of an insane person can maintain a bill in equity to have declared null the marriage of his ward on the ground of mental incapacity on the part of the ward to assent to the marriage.*" (emphasis supplied) Once more, as in *Iago*, *Pyott* cites no authority for the "well settled" concept precluding a guardian from prosecuting a divorce action; indeed *Pyott* makes only passing reference to such a concept, and then proceeds to distinguish between divorce and annulment for purposes of establishing the capacity of a guardian to act to annul.

In *Pyott*, the facts established without question that the incompetent husband was the victim of fraud and deceit and that justice required that the marriage be annulled. The court acted to protect the interests of the incompetent person and affirmed the Appellate and trial courts which had set aside the marriage.

Somewhat later in time, we are presented with the case of *Newman v. Newman*, 42 Ill. App. 2d 203, 191 N.E 2d 614, 6 A.L.R. 3d 670 (1963). In *Newman*, the next friend of an incompetent wife sued to set aside a divorce decree obtained by the husband. The next friend subsequently settled the matter with a property settlement in lieu of alimony, which settlement was approved by the divorce and probate courts. Later, the wife instituted a proceeding for further modification seeking an increase in the amount payable to her. The trial court held that the earlier modification was of no effect and entered an order modifying the original decree requiring the husband to pay permanent alimony. On appeal, the Appellate Court reversed, holding that a conservator or next friend has the power to maintain an action on behalf of his ward to set aside a divorce decree and that the next friend had the authority to settle the matter by accepting a property settlement in lieu of alimony.

The *Newman* court discusses the power of a guardian to sue for divorce. Its language is most interesting: "Although the right of a guardian, conservator, or next friend to sue for divorce of his ward *may be questionable (Pyott v. Pyott*, 191 Ill. 280, 61 NE 88 (1901)), it is the rule in Illinois that a conservator or next friend may maintain an action on behalf of his ward to vacate and set aside a divorce decree." (Citing *Bradford* and *Abend).* The court goes on to state that, although it recognized that certain powers, rights or elections may be so personal that they cannot be exercised on behalf of an incompetent,

> "(h)owever, when the exercise of a particular power, right, or election – though 'personal' in some sense – can be shown to be beneficial to the maintenance and welfare of the ward, courts have, in proper cases, permitted such rights to be exercised on behalf of the ward. *McCartney v. Jacobs*, 288 Ill. 568, 123 N.E. 557, 4 A.L.R. 1120 (1919). In *Kinnett v. Hood*, 25 Ill. 2d 600, 602, 185 N.E. 2d 888, 889 (1962) our

Supreme Court said:

> 'Our probate courts have jurisdiction under their equitable powers to determine whether and incompetent shall take under his or her spouse's will or renounce the provisions of the will . . . Courts are in agreement that the primary consideration in the best interest of the incompetent.' "

In *In Re Estate of Piech*, 117 Ill. App. 2d 463, 254 N.E. 2d 565 (1969), rehearing denied 1970, the conservator of the estate of an incompetent person petitioned the Probate Court for approval of proposed property settlement agreement between the conservator and the incompetent's wife. The Probate Court refused to approve the proposed agreement, and on appeal, the Appellate Court upheld the view that the Probate Court was without authority to approve such a settlement. Under the proposed agreement, the wife was to receive one-third of the husband's estate in lieu of her taking under the husband's will. The court points out that the will was revocable until the husband's death, that he was forty-three years old, and although suffering from mental and physical illness, he could have periods of competency in the many years of expected life which remained to him. Presumably, the wife might have received nothing under the husband's will, or much less than she would receive under the settlement agreement.

Further, the court pointed out that the only use which may be made of an incompetent's estate is to use the income and corpus thereof for the benefit of the incompetent and to provide for the comfort and suitable support of the wife of the ward. The conservator does not have the power to contract away any portion of the estate for the benefit of anyone but the ward. Quoting *Lewis v. Hill*, 387 Ill. 542, at 546, 56 N.E. 2d 619, at 621, the court stated:

> "The governing principle in the management of property belonging to a person of unsound mind is the furtherance of his interest . . . The court considers only the situation of the ward and does

nothing wantonly or unnecessarily to alter the ward's property . . . "

The court, citing *Newman v. Newman*, 42 Ill. App. 2d 203, 191 N.E. 2d 614, 6 A.L.R. 3d 670, indicated that it would approve a settlement which involved a payment *to* an incompetent, but not one that involved a disposition of the incompetent's property.

ARGUMENT

LORRAINE DREWS is plenary guardian of the estate and person of HERBERT DREWS, JR. By the Letters of Office, she "is authorized to have the care, managmement and investment of the ward's estate and the custody of the ward and to do all things required by law." Under those letters and the Probate Act of Illinois, LORRAINE DREWS has not only the *authority* and the *power* to bring this instant action; she also has a *duty* to do so. She seeks to establish the legal rights of her ward and his rights to the only asset the estate has: a cause of action. She seeks to conserve the greatest portion possible of that asset for benefit of her ward, who will need every cent of any money which comes into his estate for his care, comfort, treatment and education for the expected thirty-five or forty years of his probable lifespan. She also seeks to protect her ward from the upset and consequent endangerment presented by his wife by reason of her impulsive, thoughtless and negligent behavior on the rare occasions when she bothers to visit him.

Just as the Appellate Court found that the guardian in *Payton v. Payne*, 90 Ill. App. 3d 892 (1980) found that the guardian had the power to commence an action for annulment, petitioner herein contends that she has the statutory authority to prosecute an action for dissolution on behalf of her ward. In cases distinguishing between the power of the guardian in annulment and dissolution cases, it is ironic that the only justification put forth by the courts in any argument against empowering the guardian to prosecute

a divorce is the argument that an incompetent person cannot manifest intent, and intent of spouse is necessary to prosecute a divorce. If an incompetent person cannot sue for dissolution because he cannot formulate intent and is without legal capacity, and if divorce is a personal right which cannot be asserted on behalf of an incompetent by his guardian, an incompetent person is without any legal power to protect himself or his estate against the ravages of a disloyal, profligate spouse who has her own interests at heart, and not his own. Surely the law cannot have intended such a result.

Public policy has been invoked as the basis for the concept that only a spouse can bring an action for divorce. Public policy favors the stability of marriage and holds in disfavor any concept which does not favor the preservation of marriage. It cannot be argued that the public policy of this state has altered with respect to favoring the preservation of marriages. While the state assuredly favors the preservation of marriages, it has recognized in the implementation of this policy the realities of modern day life – changing societal mores, tremendous technological advances which have enabled the prolonging of lives which heretofore would have ended, and the reality that a large number of marriages do not work for the parties. Evidence of this recognition is to be found in the recent addition to the Illinois Marriage and Dissolution of Marriage Act of a "no fault" ground, which will soon be in effect. Certainly this reflects a major change in public attitude in cases in which there has been an event or a series of events which have rendered a marriage relationship a nullity. Such is the tragic circumstance in the instant case. We have a marriage in name only; in reality no marital relationship exists, and none ever can. All that remain are a marital estate and a need for an adjudication of rights with respect thereto. There is no reason – sentimental, public policy, or any other – for precluding the guardian in this case from petitioning to dissolve the legal shell of the

marriage and having the parties' rights adjudicated.

Modern law today recognizes in more than a few cases, including serious cases involving life and death decisions (such as those involving the termination of life support systems), the principle of substituted consent, i.e. the doctrine that the decision involved can be made by examination by the court of the situation and its determination as to what an incompetent patient would have authorized had he been able to do so, and failing a means of ascertaining this, what would be in the patient's best interests. See *In the matter of Karen Quinlan*, 70 N.J. 10, 355 A. 2d 647 (N.J., 1976), *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E. 2d 417 (1977), *In the Matter of Shirley Dinerstein*, 380 N.E. 2d 134 (Mass. 1978), (Compare, *In Re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E. 2d 435 (1965) and *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S. 2d 705 (Sup. Ct., 1962) for the proposition of the right of the individual to be able to choose death over the objections of other persons.)

To hold in this day and age that an incompetent may neither maintain a dissolution action himself nor have a dissolution of marriage action brought in his behalf by his court-appointed personal representative because of the state's interest in the stability of marriage, but to allow the state to permit a guardian to agree to permit a person to die, is not only *ironic* (as exalting a meaningless marriage, in the context of this case, over life), it is also unconstitutional as a denial of due process and equal protection under the 14th Amendment to the United States Constitution.

When the early decisions were made by Illinois courts regarding the "personal" right of divorce, the concepts of due process and equal protection had not been fleshed out as they now are. In those days, an incompetent person had very limited rights and no real rights to equality with competent persons before the law. Today the Constitution requires that handicapped persons not be discriminated

against nor denied access to legal process.

Illinois law at the turn of the century had yet to develop to provide the procedural protections we have today in guardianship cases provided for in the current Illinois Probate Act (Ill. Rev. Stat. Ch. 110-1/2, Section 11(a), originally Public Act 81-795). See, Jost, *The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled From their Zealous Protectors*, 56 Chi-Kent. L.R. 1087 (1980). "Until the 18th century, courts were very suspicious of the motives of heirs who sought guardianship over their relatives. There is very little recent evidence of such judicial suspicion. The appointment of relatives as guardians in Illinois generally has been favored and potential conflicts of interest ignored." (citations omitted) (Jost, 1089, n.10).

The current Illinois Guardianship statutes reflect a public policy interest in providing due process to the incompetent. Petitioner contends that due process means in this context that the incompetent cannot be barred from instituting a dissolution of marriage proceeding. To do so also would deprive him of equal protection in that all other citizens of Illinois would be able to seek a dissolution, but not incompetent citizens.

Petitioner contends that the current guardianship law of Illinois in its providing the guardian the power to "commence, prosecute, or defend any proceeding in his behalf" (Ch. 110-1/2 Sec. 11(a)–18(c)) grants the power to prosecute dissolution of marriage actions which are in the best interest of an incompetent. The power to defend the property interests of incompetents during a divorce proceeding has apparently been long recognized in Illinois law. See: *In Re Estate of Piech*, 254 N.E. 2d 565 (App. Div. 1st Dist., 1970), particularly at 567-68, and cases cited therein.

There is in principle nothing inconsistent between the idea that a proper way to maintain the *estate* of the in-

competent, as well as to serve his or her *personal* best interest, is to seek a judicial declaration of dissolution of marriage. The instant case is not a case in which the incompetent will ever become competent again through the remission of mental illness. The only ground in *Piech* for denying the particular claim made there was the absence of legislative authority to accomplish what was being sought. That authority now exists through the provisions of Section 11(a)-18(c) of Chapter 110-1/2. Although substantially similar language to that of Section 11(a)-18(c) appeared in the prior law Probate Act Section 124 (which language dates back to 1943), it is important to note that the subsection (c) is now listed as a *Duty* of the Estate Guardian. (Section 11(a)-18, emphasis supplied). This is not just a formal change from a "power to a duty" (which is in some schemes of analysis a very important change indeed), but also a reflection of the change in public policy, a change in the direction of granting increased powers to the guardian and providing for more dignity and personality for incompetents.

Thus not only does the guardian herein have a duty to prosecute dissolution of marriage actions under some circumstances under the Illinois Marriage and Dissolution of Marriage Act, but also the laws of the State of Illinois must now be read to provide that power as a statutory and constitutional mandate.

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Excerpt from
APPELLANT'S PETITION FOR REHEARING

In The
Supreme Court of Illinois
No. ___

STATEMENT OF FACTS

This Court rendered its opinion herein on December 19, 1986, affirming the Appellate Court which upheld the the Circuit Court of Cook County in dismissing the petition of a disabled person, by his guardian, for dissolution of marriage.

INTRODUCTION

The Guardian, in her memorandum of law submitted to the trial court filed June 15, 1984, and in her brief to the Appellate Court, argued that to preclude a disabled person from bringing an action or dissolution would be a deprivation of his constitutional right of due process. The Appellate Court did not address the issue and held that, although it was affirming the trial court in this instance, "there may be compelling instances such that Illinois law might consider granting the guardian the power to institute such a claim." *In re Marriage of Drews*, 139 Ill.App.3d 763, 487 N.E.2d 1005, 1014 (1985).

This being the holding of the Appellate Court, the Guardian appealed to this Honorable Court seeking either a reversal based on this Court's interpretation of Section 11a of the Probate Act (Ill. Rev. Stat. 1983, Ch. 110-1/2) or a clarification as to the specific circumstances which would give rise to authority in a guardian to file a dissolution action on behalf of her ward. Given the holding of the Appelate Court, the constitutional question was not in issue when this appeal was brought to this Court, and

the point was not argued. At this time, however, the holding of this Court for the first time clearly and definitively precludes access of disabled persons to the courts of Illinois for adjudication of their marital claims of right and duty, and this decision now gives rise to the issues of due process and equal protection of the law.

The Guardian respectfully suggests that in arriving at its decision, the Court did not consider this point. The Guardian further submits that inasmuch as the decision in this cause will have wide-reaching ramifications for many disabled persons and their families, the constitutional issues are of sufficient import to warrant the court's consideration at this time. Further, it is respectfully submitted that in its construction herein of Section 11a of the Probate Act of Illinois (Ill.Rev.Stat., 1979, ch. 110-1/2), "Guardians for Disabled Adults", the Court misapprehended the intention of the legislature in enacting Sec.11a-18, "Duties of the Estate Guardian." Petitioner suggests that a review of the legislative history will offer a helpful perspective to the Court.

POINTS PRESENTED FOR REHEARING

1. Does the Probate Act as construed and applied to the facts of this case deprive the Petitioner of his constitutional rights to

   (a) equal protection of the laws?

   (b) due process, including the right of privacy in its substantive due process sense?

2. Does the legislative history of Section 11a of the Probate Act reveal that the legislature intended that a guardian have the power to sue for dissolution on behalf of her ward?

I.

A DISABLED PERSON IS DENIED DUE PROCESS OF THE LAWS IF HE IS PRECLUDED FROM PROSECUTING, BY HIS GUARDIAN, AN ACTION FOR DISSOLUTION OF MARRIAGE

The 14th Amendment to the United States Constitution states in pertinent part as follows:

> "... nor shall any State deprive any person of life, liberty of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, Section 2 of the Illinois Constitution of 1970 states as follows:

> "No person shall be deprived of life, liberty or property without due process of laws nor be denied the equal protection of the laws."

Article I, Section 12 of the Illinois Constitution of 1970 states as follows:

> "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law freely, completely and promptly."

"[D]ue process requires at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). In *Boddie*, the Supreme Court addressed the issue of whether it was constitutional for the State of Connecticut to preclude indigent persons from access to dissolution proceedings by requiring payment of fees and costs which they could not afford. The Court held that "a State may not, consistent with the obligations imposed by it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship [marriage] without affording all citizens

access to the means it has prescribed for doing so." *Id.* at 383; U.S.Const., amend. XIV, sec.2. See also *King v. King*, 21 Ill.App.3d 1062, 316 N.E.2d 555 (1974).

Marriage confers rights and duties upon spouses established and regulated in this State by the Illinois Marriage and Dissolution of Marriage Act (IMDMA). Ill.Rev.Stat. 1975, ch. 40. The occurrence of a marital wrong gives rise to remedy under the IMDMA. Remedies are the life of rights and are equally protected by Art. I, Sec. 2 of the Constitution of Illinois. Deprivation of a remedy is equivalent to deprivation of the right which the remedy is intended to vindicate unless another remedy exists or is substituted for that which is taken away. *Board of Education v. Blodgett*, 155 Ill. 441, 450, 40 N.E. 1027,1027. Accord *Hogan v. Bleeker*, 29 Ill.2d 181, 193 N.E.2d 844. "[Without means of redressing a right, the right itself is like so many words in the wind." *Golden v. Holady*, 17 Ill.Dec. 199, 59 Ill.App.3d 125, 376 N.E.2d 92, 96 (1978). The IMDMA is the only means for dissolving the marital relationship. Deprivation of access to the remedies provided by the Act is a deprivation of due process rights under both the United States and Illinois Constitutions.

It is respectfully inquired of the Court, how can the IMDMA be limited in its application only to competent persons insofar as the right to bring an action for dissolution is concerned? Such a limitation creates an arbitrary classification which discriminates against disabled persons and has no fair or substantial relation to the object of the legislation. The spouses are not being treated alike. There is no such limitation on the spouse of a disabled person; the disabled person can be shed at will by his competent spouse on a mere showing of "irretrievable breakdown of the marital relationship". IMDMA, Sec.401(2). Ill.Rev.Stat., sec. 401(2) (1984). *Iago v. Iago*, 168 Ill. 339, 48 N.E. 30 (1897).

To limit the accessibility of a statutory remedy only to the competent spouse is violative of the equal protec-

tion clauses of both the Federal (U.S.Const., amend. XIV) and State (Ill.Const. 1970, part.1,sec.2) Constitutions in that it creates an impermissible distinction between the spouses which serves no legitimate State interest nor other rational basis. "To be sustained, a classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Haughton v. Haughton*, 76 Ill.2d 439, 394 N.E.2d 385, 388, 31 Ill.Dec. 183 (1979) (Rehearing denied Sept. 28, 1979); *Stanton v. Stanton* (1975), 421 U.S.7, 14, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688, 694; *F.S. Royster Guano Co. v. Virginia* (1920), 253 U.S. 412, 415, 40 S.Ct. 560, 561-562, 64 L.Ed. 989, 990-991. See also *Schiller Park Colonial Inn, Inc., v. Berz* (1976), 63 Ill.2d 499, 511, 349 N.E.2d 61; *Illinois Coal Operators Association v. Pollution Control Board* (1974), 59 Ill.2d 305, 311, 319 N.E.2d 782.

A courtoom cannot be a one-way door, open to certain plaintiffs and not to others. Such a result is not only violative of the the XIVth Amendment of the United States Constitution and the Illinois Constitution of 1970, Art.I, sec. 2, but also of the constitutionally articulated public policy of this State as promulgated by Art. I, sec. 12, set forth verbatim *supra*. An argument that the right to remedy under a divorce statute is not constitutionally protected cannot be sustained.

> "It is our conclusion that the objection urged cannot be disposed of merely by stating that the rights are by legislative grant and, therefore, not protected by the constitution. Nor are we disposed to hold that the actions affected are not remedies for injuries and wrongs to person, property or reputation within the meaning of section 19 of Article II on the premise that the words used refer only to natural rights existing independently of statute. *A person having a cause of action for divorce has been as surely wronged as and injured*

in his person as one having a cause of action for injuries sustained through the negligent operation of an automobile.

* * *

"If section 19 of article II of the constitution affords the litigant seeking a divorce an unqualified right of immediate access to the courts, the legislature has no power to deprive him of that right merely because some other process may be available for the protection of rights which are incidental to the right to maintain a divorce proceeding. The existence of such collateral remedies cannot be made a substitute for the constitutional right to obtain justice freely and without delay.

* * *

"Much interest has been placed on the profound interest of the state in the marriage relation as a justification for the imposition of special restrictions upon the filing of suits with respect thereto. This court in previous decisions, has recognized the laudable purposes which are sought to be achieved by legislation in this field, but nevertheless has been constrained to hold such legislation invalid when it impinges on the constitutional guarantees. This court cannot concern itself with the wisdom of the legislation in question, in determining whether or not it comes within the limitations which the constitution imposes." (emphasis supplied)

People ex rel. Christiansen v. Connell, 2 Ill.2d 328, 343-436, 118 N.E.2d 262 (1954).

A DISABLED PERSON IS DENIED EQUAL PROTECTION OF THE LAWS IF HE IS PRECLUDED FROM PRESENTING, BY HIS GUARDIAN, AN ACTION FOR DISSOLUTION OF MARRIAGE

While the category of handicapped persons has never been held to be a suspect classification, akin to race, under the Equal Protection Clause of the XIVth Amendment,

serious scrutiny must be applied to any statute that purports to discrimination against such persons. *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 349, 87 L.Ed.2d 313 (1986) (denial of special use permit for the operation of a group home for the mentally retarded held a denial of equal protection of the laws). Any such discrimination must be rationally related to a legitimate government purpose. *Ibid.*

It is submitted that no public policy can justify giving only one person (a competent person) the right to attempt to terminate a marriage, and deny that same right to an incompetent (as exercised through a duly appointed guardian). Mere negative attitudes of surrounding landowners, undifferentiated fears of harassment and other attempted justifications were rejected in *Cleburne.*

Discriminations against the handicapped must be examined with care because they often subsume invidious discrimination. As Justice Marshall wrote, "Prejudice, once let loose, is not easily cabined . . . As of 1979, most states still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 87 L.Ed.2d 336. At least some "idiots" may be allowed to vote by the exercise of this low-level discretion; *no* person situated as Petitioner may petition for a dissolution of marriage under this court's decision.

The United States Supreme Court has recognized the constitutional rights of equal protection for other persons incompetent under the law, including the access to public schools by children of illegal aliens, *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed. 786 (1982), and access to courts on behalf of indigents, *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (right to appointed counsel on appeal), *Griffin v. Illinois*, 51 U.S. 12 (1956) (right to free transcript needed to perfect criminal appeal).

It is submitted that equal protection requires that incompetents be permitted to bring, as well as defend dissolution of marriage actions under Illinois law.

THE ILLINOIS PROBATE ACT AS CONSTRUED AND AS APPLIED TO THE FACTS OF THIS CASE DEPRIVE APPELLANT OF HIS CONSTITUTIONAL RIGHT OF PRIVACY IN ITS SUBSTANTIVE DUE PROCESS SENSE

The United States Supreme Court has found that the United States Constitution contains within it a constitutional right to privacy. This right has been applied in a number of different situations, many of which are associated with family rights. The rights include rights to birth control, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (for unmarried persons), *Carey v. Population Services International*, 431 U.S. 678 (1977), various rights involving the right to an abortion, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1973), *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169 (1986), and rights against compulsory sterilization, *Skinner v. Oklahoma*, 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942). These include the right to establish a home, See, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The Court has also applied the constitutional right to privacy to associational interests, such as the right to live in an extended family despite zoning restrictions, *Moore v. East Cleveland*, 431 U.S. 494 (1977). In *Moore*, the city of East Cleveland was not permitted to exclude a grandmother from living with grandsons, albeit the City claimed that there were valid public policy reasons for the zoning ordinance, including the prevention of overcrowding and minimization of traffic and parking congestion. Compare, *Belle Terre v. Boraas*, 416 U.S. 1 (1974)

(city could zone out group homes of unrelated persons (at least if more than two unrelated individuals were living together)).

This right to privacy reaches the right to enter the marriage relationship. It is, for example, constitutionally impermissible for the state to place certain barriers upon the right to marry, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (cannot require court approval for a marriage because the man had not paid child support for an illegitimate daughter).

The right to privacy extends to the profoundly retarded, *Youngberg v. Romeo*, 457 U.S. 307 (1982). Such persons have a constitutionally protectable right to safety and freedom of movement. *Youngberg*. This right implies a duty upon the state to ensure that minimally adequate training be provided "at state expense if need be" to ensure safety and freedom from undue restraints. Such persons are entitled to an exercise of professional judgment as to what is required. Their rights cannot simply be ignored. Compare, *Parham v. J.R.*, 442 U.S. 584 (1979) (court recognized the right of parents to commit a child to a mental hospital, provided that professional medical judgment was applied to the decision to commit; judicial hearings were not mandatory).

Clearly, the right to marry has constitutional privacy underpinnings. While it may have historically been the case that the right to a divorce has not been seen as equally significant, the practical reality of today, that half of all marriages end in divorce, cannot be ignored. The right to marry must, of necessity, include the right to "un-marry"; once the legislature opens the courtroom doors to divorce, it may restrict that right only for substantial cause. A strong public policy justification may override a privacy right, *Whalen v. Roe*, 429 U.S. 589 (1977) (a state-operated, well-protected computer file of drug prescriptions is permissible), but that public policy justification must be ex-

amined with care, and must be strong. It is submitted that there is *no articulated* indication on the face of Illinois statutory law that there has been any public policy expressed in favor of the result this C urt reached.

The holding of this Court, in construing and applying the Illinois Probate Act to prohibit a guardian from commencing a dissolution of marriage suit on behalf of a ward, totally deprives that ward of any constitutional privacy right to seek a dissolution of marriage. Were a physician to believe that an incompetent married person were in mental or emotional anguish because of the contacts, association with or having been physically abused by a spouse, that would matter not one whit. The incompetent would in effect be deprived of any exercise of that professional judgment. Similarly, if a duly appointed guardian made such a judgment based upon other good and substantial reasons, that would matter not at all. No court in Illinois has been left with jurisdiction to address the dissolution of such a marriage. Such total destruction of any access to a remedy deprives appellant of his right to privacy in its substantive due process sense.

The Petitioner's right to due process and equal protection of the laws under the XIVth Amendment to the United States Constitution was raised in the trial court at page 15 of the *Memorandum of Law on Authority to Prosecute and Action for Dissolution of Marriage on Behalf of Ward.* It has never been waived, but has indeed been sharpened by the decision of this Court that in no situation can an action for dissolution be brought.

II.

THE LEGISLATIVE HISTORY OF THE PROBATE ACT ESTABLISHES BEYOND QUESTION THAT THE LEGISLATURE INTENDED THAT A GUARDIAN HAVE PLENARY POWER TO BRING A PETITION FOR DISSOLUTION ON BEHALF OF THE WARD

It is to be recalled that the Probate Act (Ill.Rev.Stat 1979, ch.110-1/2) was revised in 1979 as part of a broad legislative revision relating to the rights of mentally impaired persons, including The Illinois Mental Health and Developmental Disabilities Code, Ill.Rev.Stat. 1979, ch. 91-1/2, sec.101 et seq.; the Mental Health and Developmental Disabilities Confidentiality Act, Ill.Rev.Stat. 1979, ch. 91-1/2, sec. 801 et seq., the Guardianship and Advocacy Act, Ill.Rev.Stat. 1979, ch. 91-1/2, sec. 701 et seq. The legislative history of sec.11a-18 of the Probate Act is pertinent to this Petition.

Prior to the enactment of the 1979 revisions, guardianship or conservatorship of minors and incompetents was found in Ill.Rev. Stat. 1975, Sec. 11-13, "Duties of Guardian or Conservator." The Probate Act of 1975 was revised from the Probate Act of 1939, in which the subject matter of 11-13 was located at Sec. 122, "Estate Conservator's Duties". The first sentence of both sections read "The court shall have control of the person and estate of the ward." This sentence was followed in Sec. 11-13 by the phrase "Under the direction of the court:", which was prefatory to the remainder of the section.

In 1971, section 122 had been amended by P.A. 77-491 to broaden the powers of the guardian or conservator, upon approval of the court, to make "such agreements as the court determines to be for the ward's best interests" and to utilize the principal and income of the estate "for any other purpose which the court deems to be for the best interests of the ward". Ill.Rev.Stat. 1971, ch. 110-

1/2, sec. 122. This amendment was made "to overcome an appellate court opinion [*Estate of Piech*, 117 Ill.App.2d 403, 254 N.E.2d 565, (1st Dist. 1969)] intimating that the legislature had not granted judicial plenary power over the person and property of incompetents." James, *Illinois Probate Law and Practice*, Vol. 3, Sec. 122.3 (1975 Supp.), at p. 120. "Section 2 of P.A. 77-491, Laws of 1971, expressly declares that the amendment shall be construed as showing an intent of the legislature to confirm the broad powers of the court over the person and estate of incompetents and minors." *Ibid.*

Piech was "at odds with earlier Illinois decisions holding that courts of equity have broad powers over the person and property of the incompetent and may do what it is reasonable to believe the incompetent would do for himself if he had capacity ('substituted judgment' doctrine). *Lewis v. Hill*, 387 Ill. 542, 56 N.E.2d 619 (sale of real estate); *Kinnett v. Hood*, 25 Ill.2d 600, 185 N.E.2d 888 (renunciation of a will). By P.A. 77-491 effective July 28, 1971, the Legislature has *rejected Piech*. Prob. Act §§122 and 140 [§140 relates to guardians of minors' estates] have been broadened to declare that the court shall have "control" over the person and estate of the ward . . . That the Legislature so intended is clear from §2 of the amendment, which states that the legislation is 'declaratory of existing law and as showing an intention of the legislature to confirm the broad powers of the court over the person and estate of minors and incompetents.' " 18 *ISBA Probate and Trust Newsletter* 1 (Sept., 1971), Fleming, ed. [1]

In the 1979 revision of the Probate Act, the legislature divided the subject matter of Sec. 11-13 into two new sections, 11a-17 (Duties of Personal Guardian) and 11a-18 (Duties of the Estate Guardian). In both sections, the lan-

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[1] ["Affidavit of James M. Corcoran, Jr. in the Appendix hereto." omitted]

guage "The court shall have control of the person and estate of the ward" has been omitted. Sec. 11a-17 begins, "(a) To the extent ordered by the court and under the direction of the court, the guardian of the person shall . . . " Sec. 11a-18 begins, "(a) To the extent specified in the order establishing the guardianship, the guardian of the estate shall have . . . " Sec. 11a-14 elucidates "to the extent ordered by the court" and "to the extent specified in the order establishing the guardianship." Sec. 11a-14(d) states, "An order appointing a plenary guardian under this Article confers on the plenary guardian of the person the authority provided in Section 11a-17 and on the plenary guardian of the estate the authority provided under Section 11a-18." Ill.Rev.Stat. 1979, Sec. 11a-14.

The legislature had made an exhaustive study of the law in the course of its massive revision. See the *Report of the Governer's Commission for Revision of the Mental Health Code of Illinois*, Hon. Joseph Schneider, Chairman, 1976, especially *part two: Guardianship.* It is clear that omission in 11a-17 of the "control" of the court over the person of the ward was deliberate and was intended to vest that control in the guardian "under the direction of the court." It is equally clear that the language of 11a-18 deliberately invests the "care, management and investment" of the estate in the guardian and intentionally omits the "control" of the court. "Direction of the court" is required of the estate guardian only for power to perform contracts of the ward and execute and deliver a bill of sale, deed or other instrument. Ill.Rev.Stat. 1979, sec. 11a-18(b). It is particularly of interest in this cause that 11a-18(c) does not require "direction of the court" for power to represent the ward in "all legal proceedings" , although expressly, "This does not impair the power of any court to appoint a guardian ad litem or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute or defend any proceeding in his behalf." Ill.Rev.Stat. 1979,

Sec. 11a-18(c). The power to appoint a guardian ad litem or next friend is the mechanism by which the Court can provide for the representation of the ward if the guardian does not or cannot act.

The court must construe a statute according to its "plain meaning." W. Stasky, *Legislative Analysis and Drafting*, 36 (2d ed. 1984) [Stasky], *Caminetti v. United States*, 242 U.S. 470, 485 (1917). It is plain that the legislature intended that the *guardian*, and not the court, have the decision-making power in taking legal action on behalf of the ward. That this was the intention is manifest in the express reservation to the court in the matter of a ward's legal proceedings of the power *only* to appoint a guardian ad litem or next friend for the defense of the ward or to allow "any person as the next friend of a ward to commence, prosecute or defend *any* proceeding in his behalf." Ill. Rev.Stat. 1979, sec. 11a-18(c). Of course the court always has power to over-see the activities of a guardian and to take such steps as are necessary to assure that the guardian is properly protecting the ward and his interests. However, absent a showing that the guardian is not acting in the ward's best interests, the court has no legal basis for interfering with the guardian's decision-making authority. *In re Estate of D.W.*, 134 Ill.App.3d 788, 481 N.E.2d 355, 89 Ill.Dec. 804 (1st Dist. 1985).

CONCLUSION

Wherefore, Petitioner respectfully urges this Honorable Court to rehear this cause, taking into consideration the matters set forth hereinabove.

Respectfully submitted,

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Excerpt from
BRIEF AND ARGUMENT OF APPELLANT

In the
APPELLATE COURT OF ILLINOIS
First Judicial District
No. 84-3019

IV.

HERBERT DREWS WILL BE DENIED DUE PROCESS OF THE LAWS IF HE, OR HIS GUARDIAN ON HIS BEHALF, IS PRECLUDED FROM PROSECUTING AN ACTION FOR DISSOLUTION OF MARRIAGE

To hold in this day and age that an incompetent may neither maintain a dissolution action himself nor have a dissolution of marriage action brought in his behalf by his court-appointed personal representative because of the state's interest in the stability of marriage, but to allow the state to permit a guardian to agree to permit a person to die, is not only *ironic* (as exalting a meaningless marriage, in the context of this case, over life), it is also unconstitutional as a denial of due process under the 14th Amendment to the United States Constitution.

When the early decisions were made by Illinois courts regarding the "personal" rights of divorce, the concepts of due process had not been fleshed out as they now are. In those days, an incompetent person had very limited rights. Today the Constitution requires that handicapped persons not be discriminated against by denying them the right to exercise their rights to due process.

"[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). The State of Illinois must grant Herbert Drews a "meaningful opportunity to be heard" if it is to

fulfill the promise of the Due Process Clause. *Id.*, *citing Mullane v. Central Hanover Bank & Trust Co.*, 389 U.S. 306 (1950).

In *Boddie*, the Supreme Court addressed the issue of whether it was constitutional for the State of Connecticut to prevent indigent plaintiffs from seeking a judicial dissolution of their marriage solely because the plaintiffs were unable to pay the court fees and costs. *Id.* at 373. The Court held that "a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship [marriage] without affording all citizens access to the means it has prescribed for doing so." *Id.* at 383; U.S. Const. amend. XIV, Sec. 2.

As indigent plaintiffs may not be precluded from prosecuting an action for divorce based solely on the plaintiffs' inability to pay court costs and fees, so also mentally disabled plaintiffs by their guardians must not be precluded from prosecuting the same action, based solely on the plaintiffs' incapacity. Indeed, since Herbert Drews will never be able to form the intent to "personally" petition for divorce, his Due Process rights are in greater jeopardy than those of indigent clients who may, at a future date, be able to pay court fees. The guardian has a duty to protect her ward; allowing the guardian to petition for dissolution of marriage in these circumstances would enable the guardian to fulfill her duties as well as afford the ward full Due Process protection.

Petitioner recognizes that marriage involves "interests of basic importance in our society." *Id.* at 376, *citing Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535 (1942); and *Meyer v. Nebraska*, 262 U.S. 390 (1923) [parallel citations omitted]. Certainly the State of Illinois has the power to regulate, to oversee the legal relationship of marriage. *See generally* Ill. Rev. Stat. ch. 40, par. 101 *et seq.* (West Supp. 1984). Where

the State, however, monopolizes the only means by which that legal relationship may be dissolved, resort to the judicial process is not voluntary, it is absoutely necessary. In *Bodie*, the Court found that plaintiffs seeking divorce could no more voluntarily seek judicial review than defendants called upon to protect their interests in court. 401 U.S. at 376-77. "For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one." *Id.* at 377.

A state may exclude form the judicial process plaintiffs seeking a meaningful opportunity to be heard only where there is a "countervailing state interest of overriding significance." *Id.* at 377. Otherwise the Federal Constitution requires "[a] hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 313. The appropriate hearing for Herbert Drews may be had only if this Court allows him by his guardian to petition the court for dissolution of marriage.

There is not "countervailing state interest of overriding significance" that precludes the action in this case. Indeed, in *Boddie*, the Court found that "right to a meaningful opportunity to be heard within the limits of practicality..." is no less important than the rights of religious freedom, free speech or assembly. 401 U.S. at 379. Accord *Person v. Ass'n of Bar of City of New York*, 554 F. 2d 535, 537 (2d Cir. 1977) (access to courts require where fundamental, marital rights are at stake). "[T]he right to a meaningful opportunity to be heard . . . must be protected against denial by particular laws [or rules] that operate to jeopardize it for particular individuals." *Id. See Mullane*, 339 U.S. at 339; *Covey v. Town of Somers*, 351 U.S. 141 (1956).

The arguments against allowing action for dissolution of marriage brought by a guardian on behalf of her ward are not sufficient to override the ward's right to a meaning-

ful opportunity to an appropriate hearing. The State must not jeopardize the exercise of this right by Herbert or by all wards similarly situated. The consent of the guardian must be substituted for that of her ward so that Herbert Drews, as other Illinois citizens, may be granted the opportunity to have the Circuit Court of Cook County hear his petition for dissolution of marriage. To hold otherwise would deny Herbert Drews due process of the laws.